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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 571

WILLIAM H. EDELMAN, STATE TREASURER; HARRY E. WESTON, STATE TREASURER; THE CITY OF CHEYENNE, ET AL., PETITIONERS,

vs.

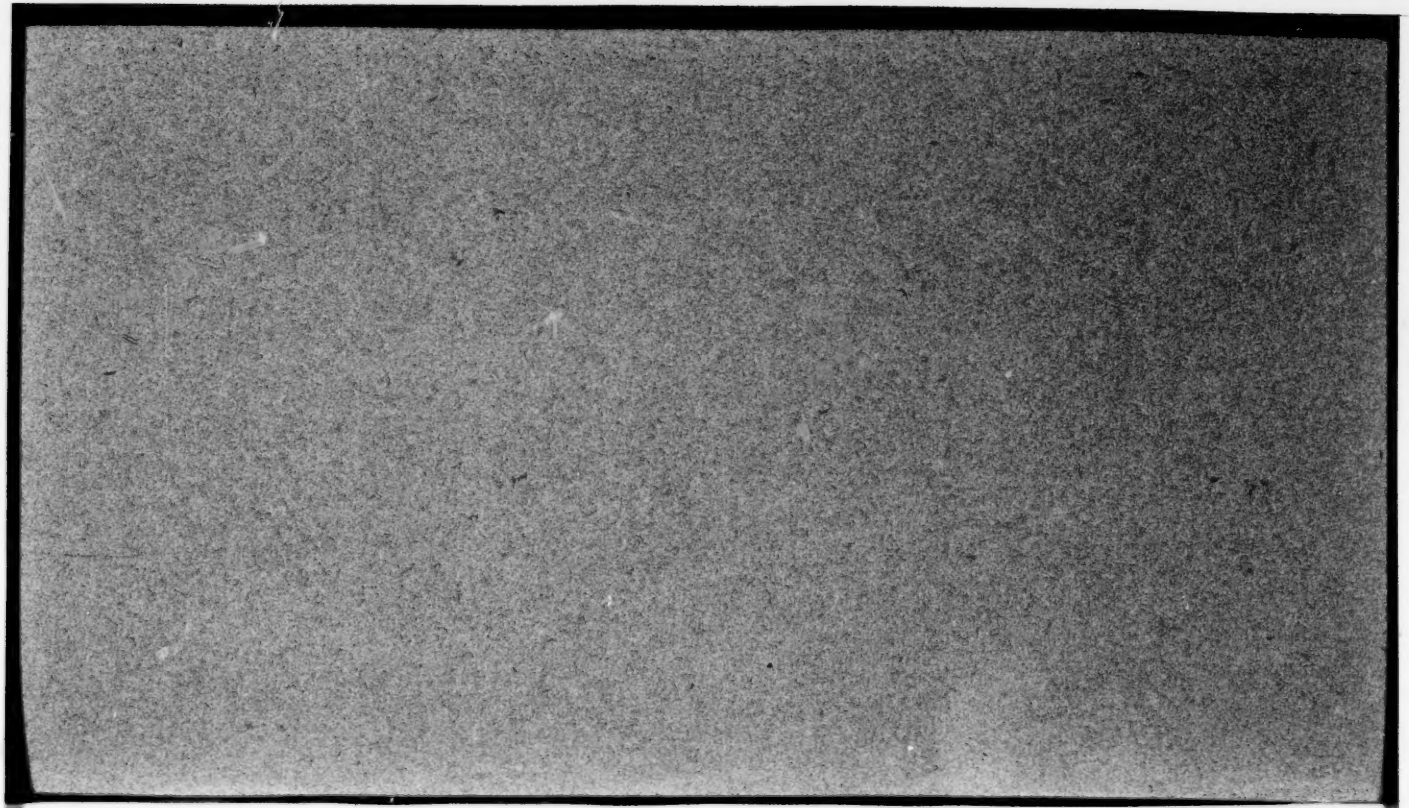
BOEING AIR TRANSPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 27, 1932.

CERTIORARI GRANTED FEBRUARY 6, 1933

(37,268)



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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT

No. 2049

BOEING AIR TRANSPORT, INC., a Corporation, Plaintiff,

vs.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; The City of Cheyenne, a Municipal Corporation; and The City of Rock Springs, a Municipal Corporation, Defendants

BILL OF COMPLAINT—Filed Nov. 25, 1930

Comes now the plaintiff, the Boeing Air Transport, Inc., and complaining of the said defendants, William H. Edel-
[fol. 2] man, State Treasurer, The City of Cheyenne and The City of Rock Springs, for cause of action alleges:

1. That the plaintiff is a corporation organized and existing under the laws of the State of Washington and duly authorized to do business of the kind which it is transacting as hereinafter alleged, in and through the State of Wyoming, and is a citizen and resident of said State of Washington.

2. That the defendant, William H. Edelman, is a citizen and resident of the State of Wyoming, and is an officer of the State of Wyoming, namely, the duly elected, qualified and acting State Treasurer of the State of Wyoming.

3. That this action is a suit of a civil nature, and arises under the Constitution and laws of the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars ($3,000.00).

Plaintiff further alleges and shows that this action is one in which said plaintiff seeks to enjoin the defendant, William H. Edelman, a State officer of the State of Wyoming, from collecting an unconstitutional and illegal tax levied

and imposed by the State of Wyoming upon plaintiff in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, and that the value of the right of this plaintiff to transact interstate business and commerce in and through the State of Wyoming, without being subjected to such unconstitutional, illegal and void tax, is far in excess of $3,000.00 exclusive of interest and costs. And plaintiff shows that unless the defendant shall be restrained from the collection of such unconstitutional, illegal and invalid tax this plaintiff will be forced to pay unto the defendant William H. Edelman such illegal and void taxes in an amount far in excess of $3,000.00 exclusive of interest and costs, in order to carry on its interstate business and commerce as hereinafter set forth.

4. That this plaintiff is now and for a long time hitherto has been engaged in and intends to continue to carry on and transact interstate commerce and business, and is now and for a long time hitherto has been engaged and intends to continue to carry on and transact such interstate commerce and business in transporting passengers and express and United States mails by airplane for hire and profit, into, [fol. 3] across and through the State of Wyoming from points outside the boundaries thereof and from points within the State of Wyoming to points outside the boundaries thereof, and also a small amount of similar business from points inside the State of Wyoming to other points within said State, all of which is carried on intermingled in the same airplanes.

5. That the fuel used in propelling the plaintiff's airplanes is gasoline, and plaintiff knows of no other fuel which can be practically, conveniently or profitably used therefor; that the gasoline purchased by and delivered to the plaintiff and used by the plaintiff as fuel for the operation and propulsion of its said airplanes in its commingled intrastate business and commerce and interstate business and commerce cannot be apportioned between the said two classes of business.

6. That the plaintiff owns, operates and maintains airplanes in interstate commerce and business as aforesaid, upon regularly defined routes and schedules, the motive power used by said airplanes, and each of them, being as aforesaid exclusively the use of gasoline as fuel.

7. That a part of such gasoline used by the plaintiff is purchased by and delivered to the plaintiff in the State of Wyoming; that a part thereof is purchased outside of said State, and that such gasoline purchased and delivered to the plaintiff either in or outside of said State of Wyoming is used and consumed by it as fuel for the propulsion of its said airplanes in its interstate commerce and business as aforesaid, and is an instrumentality of interstate commerce.

8. Plaintiff further shows that in its said interstate commerce business some passengers, mail and express are transported and carried in intrastate business, and in that connection plaintiff shows that the said two classes of business, interstate and intrastate, are so commingled that the separation of the one from the other is not reasonably practicable and/or economical, and the plaintiffs' interstate passengers, mail and express cannot be carried efficiently and economically in airplanes used exclusively in interstate commerce, nor can plaintiff's intrastate passengers, mail and express be carried efficiently and/or economically in airplanes used exclusively in intrastate commerce, and that plaintiff's said interstate business is dependent in a con- [fol. 4] siderable degree upon plaintiff's intrastate business, and that plaintiff cannot profitably or economically use or operate separate airplanes in interstate business or separate airplanes in intrastate business.

9. That by divers acts of the Legislature of the State of Wyoming, to-wit, Chapter 73 of the Session Laws of Wyoming of 1923, entitled "An Act providing a license tax on gasoline, providing for the collection thereof, defining certain words or phrases, prescribing manner and methods of payment, fixing penalties for failure to make same, and providing for the disposition of said taxes"; together with Chapter 89 of the Session Laws of Wyoming of 1925, entitled "An Act to amend and re-enact Sections 2, 3 and 5, Chapter 73, Session Laws of Wyoming, 1923, providing a license tax on gasoline and providing for the disposition of such license taxes, and display of price signs by dealers in gasoline and prescribing penalty for violation"; together with Chapter 70 of the Session Laws of Wyoming of 1927, entitled "An Act to amend and re-enact Section- 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Sections 1 and 2, Chapter 89, Session

Laws of Wyoming, 1925, and to amend and re-enact Section 4 of Chapter 89, Session Laws of Wyoming, 1925, relating to display of price signs by dealers and providing a penalty for violation thereof; providing a license tax on gasoline and for the collection and statement of the amount of tax collected"; together with Chapter 139 of the Session Laws of Wyoming of 1929, entitled "An Act to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended by Sections 1 and 2, Chapter 70, Session Laws of Wyoming, 1927, and to amend and re-enact Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 3, Chapter 39, (89?) Session Laws of Wyoming, 1925, and to amend and re-enact Section 6, Chapter 73, Session Laws of Wyoming, 1923; providing for a license tax on gasoline, and for the collection and statement of the amount of tax collected; providing for the disposition of said taxes, and fixing penalties for violation of any of the provisions of this Act"; and Chapter 14 of the Session Laws of Wyoming enacted at the Special Session, 1929, entitled "An Act to amend and re-enact Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, [fol. 5] Chapter 70, Session Laws of Wyoming, 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, providing for a license tax on gasoline, and for the collection thereof and providing for statements of gasoline sold or used by wholesalers or users and the payment of the tax by them; and providing for the disposition of the tax from gasoline used on municipal air fields and fixing penalties for violation of any of the provisions of this Act"; (each of which acts for convenience is quoted in full in an appendix to this bill of complaint), and by the construction and interpretation of the said acts by the defendant and by the State of Wyoming and its officers the said State of Wyoming imposed and levied a tax of four cents per gallon on each and every gallon of gasoline placed by the plaintiff, in its airplanes while within the State of Wyoming, whether purchased or delivered to it in the State of Wyoming, or elsewhere, and on each and every gallon of gasoline put into the tanks of each of its airplanes within the State of Wyoming for consumption in propelling such airplanes in its commerce as aforesaid, and on each and every gallon of gasoline consumed by the plaintiff in

the State of Wyoming in its aforesaid commerce, that under the provisions of said acts the defendant, Treasurer of the State of Wyoming, and his respective deputies, agents, servants, attorneys, workmen and other employees are charged with and exercise the duty of collecting and disbursing the said tax as therein provided; that under the said statutes the penalties and liabilities, civil and criminal, against the plaintiff, its officers and employees, for any failure in the payment of any tax demanded under said statute include among other things liability for double the amount of the tax, liability to injunction against the plaintiff and its vendors, without bond, such as would prevent the plaintiff from obtaining any gasoline, liability to have appointed for the plaintiff a receiver for its property and its business, liability on the part of its officers and employees to fine and imprisonment; that for a long time prior hereto the said defendant, State Treasurer, and his deputies, agents, servants, attorneys, workmen and/or employees have wrongfully and without authority of law required the said plaintiff to pay the said tax on each and every gallon of gasoline purchased or put into the tanks of its airplanes or used as aforesaid in the conduct of its said [fol. 6] interstate commerce and business, and that the said defendant, State Treasurer, and his respective deputies, agents, servants, attorneys, workmen and/or employees still require and threaten to continue to require the payment of the said tax by the plaintiff, and will wrongfully and unlawfully continue to exact and collect the said tax from the plaintiff unless enjoined and restrained from so doing by order of this court; that the defendant, his deputies, employees and agents have already exacted from the plaintiff under the said statute, and the plaintiff to avoid on its own part and on that of its employees and officers the great penalties, civil and criminal, denounced by said statutes, has paid to the defendant, William H. Edelman, under proper and sufficient protest, the following sums for gasoline put into its airplane tanks at Cheyenne and used in the aforesaid commerce, to-wit:

March 15, 1930	$424.08
April 12, 1930	455.96
May 10, 1930	651.68
June 14, 1930	549.64

July 15, 1930	666.24
August 13, 1930	698.40
September 11, 1930	724.48
October 13, 1930	668.92
November 15, 1930	689.88

And the defendant, his deputies, employees, agents, etc., have likewise under the said statute demanded and exacted from the plaintiff, and the plaintiff to escape the extreme civil and criminal penalties of said statutes, has paid to the defendant, William H. Edelman, under proper and sufficient protest, for gasoline placed in its airplanes at Rock Springs, used in such interstate commerce, the following sums, to-wit:

March 15, 1930	$181.00
April 12, 1930	240.28
May 10, 1930	256.32
June 14, 1930	275.00
July 15, 1930	314.04
August 13, 1930	322.32
September 11, 1930	363.04
October 13, 1930	355.60
November 15, 1930	418.72

[fol. 7] 10. Plaintiff alleges that the said statutes of Wyoming are unconstitutional, illegal and void in so far as they, or any or either of them, apply to plaintiff, for the reason that the same directly burdens and interferes with interstate commerce, and particularly for the reason that the said statutes as applied to plaintiff directly burden and interfere with the said interstate commerce and business of plaintiff in transporting and carrying mail, passengers and/or express in interstate commerce by air, and plaintiff alleges that the said tax is unconstitutional, illegal and void so far as it applies to plaintiff and its said business because it conflicts with, offends against and is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the several states, in that the said statutes purport to impose and levy, and do impose and levy a tax on all gasoline purchased or consumed as fuel in Wyoming to propel airplanes flying between the said State and

neighboring States in interstate commerce, thus exacting the said tax as the price of the privilege of using an instrumentality of interstate commerce and thus evading the exclusive power of Congress to regulate commerce between the several States.

11. Plaintiff further avers that the said defendant, the City of Cheyenne, and the said defendant, the City of Rock Springs, and each of them, are municipal corporations organized and existing under the laws of the State of Wyoming and each of them is a citizen and resident of the State of Wyoming; that there is at each of the said municipal corporations a municipal air field, at each of which the airplanes used by this plaintiff land more or less regularly and more or less regularly are supplied with gasoline to be used as fuel in propelling its airplanes in interstate commerce as aforesaid.

Plaintiff alleges that the said statutes as construed by the defendants, and each of them, appropriate to the said defendant, the City of Cheyenne, all funds received from the said gasoline license tax on gasoline taken into the airplanes of the plaintiff at Cheyenne for use by the plaintiff in such interstate commerce and directs such fund to be paid over to the said City of Cheyenne, and likewise that all of the said taxes for gasoline taken into the plaintiff's airplanes at [fol. 8] Rock Springs for use in the said interstate commerce are to be paid to the said City of Rock Springs, by reason whereof the said defendant, The City of Cheyenne, is not only claiming the sums, and each of them, that have been paid by this plaintiff to the defendant, Edelman, for gasoline so put into its airplanes at Cheyenne for use in said interstate commerce, but is also claiming that the plaintiff be compelled to continue such payments indefinitely for the future; and in like manner the said City of Rock Springs is not only claiming the sums, and each of them, that have been paid by this plaintiff to the defendant, Edelman, for gasoline so put into its airplanes at Rock Springs for use in said interstate commerce, but it also claiming that the plaintiff be compelled to continue such payments indefinitely for the future, and by reason of the said construction of the said statutes and the claims so as aforesaid made by and on behalf of the said City of Cheyenne and of the said

City of Rock Springs, each of the said municipalities is a necessary party to the full determination of the constitutionality of the said statutes as so as aforesaid applied to this plaintiff; and the said City of Cheyenne is a necessary party to any full settlement and disposition of so much of this cause as applies to the taxes already paid by the plaintiff for gasoline placed in its tanks at Cheyenne and used in interstate commerce as aforesaid, and the said City of Rock Springs is a necessary party to any full settlement and disposition of so much of this cause as applies to the taxes already paid by the plaintiff for gasoline placed in its tanks at Rock Springs and used in interstate commerce as aforesaid.

12. And plaintiff further shows that if the exactions made from the plaintiff as alleged herein be held to be exactions of ordinary taxation upon the gasoline as property owned by plaintiff, in order to produce revenues for public purposes, State, County and municipal, such taxation is illegal and void, in that it violates the second provision of Section 28 of Article I of the Constitution of the State of Wyoming, which is in these words:

"All taxation shall be equal and uniform."

And also violates Section 11 of Article XV of the Constitution of the State of Wyoming, which is in these words, to-wit:

[fol. 9] "All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

For that as to all other personalty within the State of Wyoming the owner thereof under the provisions of Section 2762 of the Wyoming Compiled Statutes of 1920, is taxed only upon the value of so much thereof as is owned by such owner on the first day of April of the then current year, while on the gasoline used by plaintiff as aforesaid the said license tax exacted from this plaintiff, as herein averred, is levied upon all gasoline bought or used by plain-

tiff during the year, although the plaintiff did not on April 1st, or on any other day, own as much as one-tenth part of the gasoline upon which the said tax is exacted as in this bill alleged.

And, moreover, although the highest amount of the ordinary tax for all purposes levied upon other personalty in any year in Cheyenne or in the County in which it is located, or in Rock Springs or in the County in which it is located or at any other place in Wyoming, does not exceed four per centum of the value of such personalty, yet the license tax levied as herein alleged against the gasoline used by this plaintiff in interstate commerce, as herein shown, exceeds twenty per centum of the value of all gasoline, not only all that owned by the plaintiff on any one day but twenty per centum of all of that from time to time bought or used by the plaintiff in its said interstate commerce business in Wyoming.

13. And plaintiff further alleges that each and every the payments of said tax by the plaintiff has been paid solely in order that the plaintiff might be permitted to continue to use gasoline in propelling its said airplane in such interstate commerce and business and in order to avoid irreparable loss and injury by the imposition upon the plaintiff and its officers, agents and employees of the penalties, civil and criminal, imposed by said Acts, each and every of which penalties the said defendant, his deputies, agents, assistants, servants, etc., has threatened and still threatens to enforce and each of which the said defendant personally and through his said agents, deputies, officers and assistants will enforce unless restrained and enjoined from so doing.

[fol. 10] 14. Plaintiff further shows that under the provisions of said statutes the wholesale distributors or consignees of gasoline are made agents of the State of Wyoming for the purpose of collecting said gasoline tax, said agents acting under the direction of the *de*-defendant, State Treasurer, and while the said distributors and/or consignees of gasoline actually collect, return and remit said tax to the State of Wyoming and to the defendant, the State Treasurer, said gasoline tax is in law and in practice levied and imposed against the consumer of said gasoline within the State of Wyoming and not against the wholesale

distributor or consignee, and such tax is paid by all such consumers, ordinarily direct to the defendant, the Treasurer of the State of Wyoming, which said tax this plaintiff has been forced to pay in order to purchase or consume any gasoline in the State of Wyoming, and will hereafter be forced to pay until defendant, his agents, servants, employees, workmen and other persons acting by and through him, are enjoined and restrained from collecting the same by order of this court.

15. And plaintiff further avers that under the laws of the State of Wyoming relief by injunction is a remedy afforded all persons as a remedy to enjoin the enforcement and/or collection of any illegal levy of any tax, charge or assessment and of any proceedings to enforce the same, and further alleges that the remedy by injunction sought by the plaintiff herein alone will afford to the plaintiff complete or speedy relief; that the plaintiff has no adequate remedy at law; that the entire controversy involved herein can be settled in one suit in equity in which much time and great expense will be saved and a multiplicity of suits prevented, and that such results cannot, nor can any reasonable relief, be obtained by any remedy at law, either in a single suit brought by the plaintiff, or otherwise.

Plaintiff further avers that under the provisions of said statutes the distributors of gasoline, and each of them, are charged with the duty as agents of the State of Wyoming of collecting and returning the tax to the defendant the State Treasurer of Wyoming, and that the plaintiff in order to continue to operate its said airplanes in the conduct of its said business is compelled to purchase from time to time, and from day to day, large quantities of gasoline in the State of Wyoming, and that no such distributor or any [fol. 11] other dealer in gasoline in said State will sell such gasoline to the plaintiff unless the plaintiff so purchasing the same shall make payment of the said tax levied and assessed thereon at the time of the purchase thereof, and that hence the plaintiff is unable to purchase any gasoline in the State of Wyoming for the operation or propulsion of its said airplanes without at the time paying the said tax thereon, and plaintiff alleges that by the express provisions of said Acts and/or by the practical operation thereof by the defendant and the legal effect thereof the

said tax is absorbed in the price paid for all gasoline purchased in Wyoming for use or consumption in the said State by the purchaser, including this plaintiff, and that under the provisions of the said Acts the said tax, although required to be collected and returned to the State by the distributor of or dealer therein as the agent of the State, is both in practice and in legal effect a tax on the consumer of such gasoline and that unless the injunctive relief herein sought be granted the said interstate business of the plaintiff herein will be daily and constantly burdened, interferred with and damaged, to the great and irreparable injury of the plaintiff; that this plaintiff by reason of the facts hereinbefore and hereinafter set forth has no clear, adequate or complete remedy at law, and it will suffer irreparable damage and injury and be subjected to a multiplicity of vexatious suits and litigation unless the enforcement and collection of the said tax in so far as it applies to gasoline purchased and/or consumed by the plaintiff in the State of Wyoming as fuel for the operation of its said airplanes in interstate commerce and business as aforesaid, is immediately enjoined and restrained by a temporary or interlocutory injunction granted by this court as prayed for herein, and unless upon final hearing the collection and enforcement of the said tax be perpetually enjoined and restrained as herein prayed for.

And plaintiff avers and shows that it has paid to the proper officers in Wyoming all taxes justly or properly due from it at any place within the State of Wyoming, both on its gasoline and upon all its other property in Wyoming, including the gasoline license tax on all gasoline used by it locally in Wyoming.

Wherefore, plaintiff prays:

1. That upon proper notice and hearing this court grant [fol. 12] an interlocutory injunction restraining and enjoining the defendant, William H. Edelman, Treasurer of the State of Wyoming, his agents, servants, deputies and all others working under or through him as such State Treasurer, from the collection of said gasoline tax from this plaintiff during the pendency of this action.

2. That upon final hearing of this cause it be adjudged and decreed by this court that the said Acts and statutes of

the Wyoming Legislature are unconstitutional, illegal and void as applied to this plaintiff and as applied to the said interstate commerce business of the plaintiff, and that the said defendant, William H. Edelman, as such State Treasurer, and his respective deputies, agents, servants, attorneys, workmen, employees and successors in office, be perpetually enjoined and restrained from exacting or attempting to exact the payment of the said tax by the plaintiff and from collecting, or attempting to collect or enforce, said tax from the plaintiff on any such gasoline hereafter purchased and/or consumed in the State of Wyoming for such interstate commerce purposes, and that the defendant be decreed to pay the costs of this action, and that this court grant unto this plaintiff such other and further relief as the equity and justice of the case may require and which the court may deem meet and just, whether specifically prayed for herein or not.

John W. Lacey, Herbert V. Lacey, Attorneys for Plaintiff.

Duly sworn to by D. B. Colyer. Jurat omitted in printing.

[fol. 13] (The appendix attached to the bill of complaint consisting of copies of Wyoming Statutes are omitted by direction of the appellant as unnecessary and needlessly encumbering the transcript.)

In United States District Court

Separate Answer in Equity of the City of Rock Springs, a Municipal Corporation

Filed Dec. 18, 1930

To the Honorable, the Judge of the District Court of the United States, for the District of Wyoming, sitting in Equity:

Comes now The City of Rock Springs, a municipal corporation, organized and existing under and by virtue of the laws of the State of Wyoming, and served with subpœna in the above entitled proceeding on the 27th day of

November, 1930, as being one of the defendants in the above entitled proceeding, designated The City of Rock Springs, a municipal corporation, and for its separate answer to the bill of complaint in equity of the complainant in the above entitled action, admits, denies and alleges as follows:

1. Admits that the plaintiff is a corporation existing under the laws of the State of Washington, and is duly authorized to do business in the State of Wyoming.

2. Admits that the defendant, William H. Edelman, is a citizen and resident of the State of Wyoming, and is the duly elected, qualified and acting State Treasurer of the State of Wyoming.

3. This defendant denies that the suit herein, or any cause of action stated in the plaintiff's bill, arises under the Constitution and laws of the United States.

This defendant admits that the amount in controversy exceeds Three Thousand Dollars ($3,000.00).

This defendant admits that in the filing by the plaintiff of its bill of complaint herein, that it seeks to enjoin the defendant, William H. Edelman, as the State Treasurer of the State of Wyoming, from collecting the tax levied and imposed by the State of Wyoming upon the plaintiff, but this defendant denies that the said tax is either unconstitutional or illegal, or in violation of Clause 3 of Section 8 of [fol. 14] Article 1 of the Constitution of the United States, or otherwise, or at all.

4. This defendant admits that the plaintiff is now engaged in the business of transporting passengers and express and United States mails by airplane for hire and profit, into, across and through the State of Wyoming, from points outside of the boundaries thereof, and from points within the State of Wyoming to points outside the boundaries thereof, and is engaged in the similar business from points inside the State of Wyoming to other points within said State.

And as to the averment that the plaintiff intends to continue in the future to transact said business, this defendant has no knowledge or information sufficient to form a belief and therefore denies the same.

5. This defendant admits that the fuel used in propelling the airplanes of the plaintiff at the present time is gasoline,

but as to the averment that the plaintiff cannot apportion and separate the amount of gasoline used upon its airplanes in intrastate business and commerce from interstate business and commerce, this defendant denies the averment.

6. This defendant admits that the plaintiff owns, operates and maintains airplanes in interstate commerce and intrastate commerce, as averred in paragraph six of its bill of complaint, and that the fuel now used by said airplanes is gasoline.

7. This defendant admits that a part of the gasoline used by the plaintiff in its said airplanes is purchased and delivered to the plaintiff in the State of Wyoming.

8. This defendant admits that some of the business and commerce of the plaintiff is transported in intrastate business, and some in interstate business, but denies that the said classes of business are so commingled that the separation of one from the other is impracticable and/or uneconomical.

9. This defendant admits that gasoline placed in the airplanes of the plaintiff at Rock Springs is for the months of March, April, May, June, July, August, September, October and November, as set forth in paragraph nine of the plaintiff's bill of complaint, but this defendant denies that the State Treasurer, his deputies, agents, servants, attorneys, [fol. 15] workmen, and/or employees, have wrongfully, and without authority of law, required the plaintiff to pay a tax of four cents per gallon on each and every gallon of gasoline placed by the plaintiff in its airplanes while within the State of Wyoming.

This defendant admits that the divers acts of the Legislature of the State of Wyoming are as set forth in said paragraph nine of the plaintiff's bill of complaint.

10. This defendant denies that the statutes of the State of Wyoming, a*nd* set forth in paragraph nine of the plaintiff's bill of complaint, are unconstitutional, illegal and void, in so far as they, or any of them, apply to the plaintiff in the gasoline placed by the plaintiff in its airplanes while within the State of Wyoming.

11. This defendant admits that the City of Rock Springs is a municipal corporation organized and existing under

the laws of the State of Wyoming, and that said municipal corporation was at all times stated in the plaintiff's bill of complaint, such corporation and that the plaintiff's airplanes are more or less regularly supplied with gasoline at the airplane field of the said City of Rock Springs, and that all of the taxes for gasoline taken into the plaintiff's airplanes at Rock Springs, are, under the law, to be paid to the City of Rock Springs, and that the City of Rock Springs is claiming for its use, all such taxes derived from said gasoline, so used.

12. This defendant denies that the revenues produced from said gasoline taxation are in violation of the Constitution of the State of Wyoming, or at all, or that said tax upon gasoline is illegally assessed, or is not uniformly assessed.

13. And as to the averment that the plaintiff will suffer irreparable loss and injury, by the collection of said gasoline tax, or by the imposition of the penalties provided by law for the nonpayment thereof, this defendant denies the same.

And as to the averment that the State Treasurer has threatened, and still threatens to enforce the penalties imposed by the said acts of the Legislature, this defendant has no knowledge or information sufficient to form a belief, and therefore denies the same.

[fol. 16] 14. This defendant admits that under the provisions of the statutes, the wholesale distributors of gasoline return and remit the gasoline tax to the State of Wyoming, and to the defendant, the State Treasurer, and that the said gasoline tax is levied and imposed against the consumer of said gasoline within the State of Wyoming.

15. Said defendant, The City of Rock Springs, as and for its further answer to the bill of complaint of complainant, herein, states and alleges that it is without knowledge of each, or all, of the other facts and allegations contained in said complaint, not hereinbefore specifically admitted, denied or explained.

Wherefore, said City of Rock Springs, served by subpœna, as aforesaid, in the above entitled proceedings, prays for a judgment and decree of the court that said bill of com-

plaint be dismissed as to said City of Rock Springs, served by subpœna, as aforesaid, and that said City of Rock Springs have and recover its costs herein necessarily expended, and that the said City of Rock Springs have such other and further relief as may be just and equitable in the premises.

T. S. Talliaferro, Jr., F. D. Johnson, Solicitors and Attorneys for City of Rock Springs, served with subpœna, as aforesaid.

Duly sworn to by P. C. Bunning and Roy Connor. Jurat omitted in printing.

[fol. 17] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT, CITY OF CHEYENNE—
Filed Dec. 27, 1930

Comes now defendant, City of Cheyenne, and for its answer to the Bill of Complaint of the plaintiff, as filed in the above court, admits, denies and avers as follows:

1. This answering defendant, City of Cheyenne, admits the allegations of paragraphs one and two of the Bill of Complaint herein filed.

2. This defendant, for its answer to Paragraph three of said Bill of Complaint, admits that this action is a suit of a civil nature; that the amount in controversy exceeds, exclusive of costs and interests, the sum and value of Three Thousand ($3,000.00) Dollars; denies that said action arises under the Constitution and laws of the United States; admits that the plaintiff by this action seeks to enjoin the defendant, William H. Edelman, as a state officer of the State of Wyoming, from collecting a tax levied and imposed by the State of Wyoming upon plaintiff; but denies that said tax, so levied and imposed is unconstitutional and illegal and denies that the imposition of said tax is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States. For want of information sufficient to form a belief, the defendant denies that the value of the right of the plaintiff to transact interstate business and commerce in and through the State of Wyoming is far in excess of

Three Thousand Dollars, exclusive of interest and costs; denies that plaintiff is, by reason of carrying on its said business, subject to an unconstitutional, illegal and void tax. This defendant further admits that, unless restrained by order of the court, the defendant, W. H. Edelman, will collect from the plaintiff said tax, but denies that said tax is unconstitutional, illegal and invalid and denies that said [fol. 18] defendant will collect any illegal and void tax in the amount of Three Thousand Dollars, exclusive of interests and costs, as set forth in this petition.

3. This defendant, in answer to Paragraph 4 of Plaintiff's Bill of Complaint, admits that for some time hitherto, plaintiff has been engaged in and has transacted interstate commerce and business in transporting passengers and express and United States mail by airplane for hire into, across and through the State of Wyoming from points outside the boundaries thereof and from points within the State of Wyoming to points outside the boundaries thereof and has transacted a small amount of similar business from points inside the State of Wyoming to other points within said State; but that for want of information sufficient to form a belief, denies that plaintiff intends to continue to carry on and transact interstate commerce and business in the State of Wyoming. Defendant denies that all of said business, as so set forth in said Paragraph 4, is intermingled in the same airplanes.

4. The defendant, for answer to Paragraph 5 of Plaintiff's Bill of Complaint, admits that gasoline is used as fuel in said airplanes for the purpose of propelling the same; denies that gasoline purchased by and delivered to plaintiff and used by plaintiff, as said fuel, for the operation and propulsion of its said airplanes cannot be apportioned between the said two classes of business; and avers the fact to be that the gasoline purchased by and delivered to the plaintiff and used by the plaintiff as fuel for the operation and propulsion of its said airplanes can be apportioned between the said two classes of business, for the reason that the gasoline has been and is being apportioned, under agreement between plaintiff and this defendant as is evidenced by the fact that the gasoline used by the plaintiff in its

interstate business is being kept in one tank at its airfields at Cheyenne and Rock Springs, respectively; and the gasoline used by the plaintiff in its intrastate business, is kept in another and different tank at its airfields at Cheyenne and Rock Springs; and has been since on or about March 15, 1930; and the payment of the tax on the gasoline so used in interstate commerce and business has been paid separately and under protest since on or about said March 15, 1930, while the payment of the tax on the gasoline so used in interstate commerce and business, has been paid sepa- [fol. 19] rately and without protest, since on or about said March 15, 1930.

Further answering the allegations of said paragraph 5 of plaintiff's Bill of Complaint, the defendant denies that said intrastate business and commerce and said interstate business and commerce are commingled and alleges the fact to be that the said intrastate business and commerce and said interstate business and commerce cannot be commingled. That for want of information sufficient to form a belief, denies that plaintiff knows of no other fuel which can be practically, conveniently or profitably used in connection with said business.

5. The defendant, for answer to Paragraph 6 of said Bill of Complaint, admits that the plaintiff owns, operates and maintains airplanes in interstate commerce and business as aforesaid upon legally defined routes and schedules; further admits that the motive power by said airplanes, and each of them, being as aforesaid, is exclusively the use of gasoline as fuel.

6. The defendant, for answer to Paragraph 7 of Plaintiff's Bill of Complaint, admits that part of the gasoline used by plaintiff in its said business is purchased by and delivered to plaintiff in the State of Wyoming; admits that a part thereof is purchased outside of said state and that such gasoline purchased and delivered to the plaintiff either in or outside of said State of Wyoming is used and consumed by plaintiff as fuel for the propulsion of its said airplanes in its interstate commerce and business as aforesaid and alleges that a part of said gasoline as purchased by said plaintiffs is used in its intrastate commerce and business. The defendant denies said gasoline, purchased

and used by the plaintiff, is an instrumentality of interstate commerce.

7. The defendant, for its answer to Paragraph 8 of plaintiff's Bill of Complaint, admits that in the said interstate commerce and business, some passengers, mail and express are transported and carried in intrastate business, but denies that intrastate business and interstate business are so commingled and denies that a separation of one from the other is not reasonable and practical; denies that they are commeingled and denies that plaintiff's interstate passengers, mail and express business cannot be carried efficiently and economically in airplanes used exclusively in interstate commerce and denies that plaintiff's intrastate [fol. 20] passengers, mail and express can not be carried likewise in airplanes used exclusively in intrastate commerce.

8. The defendant, for his answer to Paragraph 9 of Plaintiff's Bill of Complaint admits that by divers acts of the Legislature of the State of Wyoming, to-wit, Chapter 73 of the Session Laws of Wyoming of 1923, entitled "An Act providing a license tax on gasoline, providing for the collection thereof, defining certain words or phrases, prescribing manner and methods of payment, fixing penalties for failure to make same, and providing for the disposition of said taxes;" together with Chapter 89 of the Session Laws of Wyoming of 1925, entitled "An Act to amend and re-enact Sections 2, 3 and 5, Chapter 73 Session Laws of Wyoming, 1923, providing a license tax on gasoline and providing for the disposition of such license taxes, and display of price signs by dealers in gasoline and prescribing penalty for violation"; together with Chapter 70 of the Session Laws of Wyoming of 1927, entitled "An Act to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Sections 1 and 2, Chapter 89, Session Laws of Wyoming, 1925, and to amend and re-enact Section 4 of Chapter 89, Session Laws of Wyoming, 1925, relating to display of price signs by dealers and providing a penalty for violation thereof; providing a license tax on gasoline and for the collection and statement of the amount of tax collected"; together with Chapter 139 of the Session Laws of Wyoming of 1929, entitled "An Act to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as

amended by Sections 1 and 2, Chapter 70, Session Laws of Wyoming, 1927, and to amend and re-enact Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 3, Chapter 39, (397) Session Laws of Wyoming, 1925, and to amend and re-enact Section 6, Chapter 73, Session Laws of Wyoming, 1923; providing for a license tax on gasoline, and for the collection and statement of the amount of tax collected; providing for the disposition of said taxes, and fixing penalties for violation of any of the provisions of this Act"; and Chapter 14 of the Session Laws of Wyoming enacted at the Special Session, 1929, entitled "An Act to amend and re-enact Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-en- [fol. 21] acted by Section 2, Chapter 70, Session Laws of Wyoming, 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, providing for a license tax on gasoline, and for the collection thereof and providing for statements of gasoline sold or used by wholesalers or users and the payment of the tax by them; and providing for the disposition of the tax from gasoline used on municipal air fields and fixing penalties for violation of any of the provisions of this Act; and by the construction and interpretation of the said acts by the defendant and by the State of Wyoming and its officers the said State of Wyoming imposed and levied a tax of four cents per gallon on each and every gallon of gasoline placed by the plaintiff, in its airplanes while within the State of Wyoming, whether purchased or delivered to it in the State of Wyoming, or elsewhere, and on each and every gallon of gasoline put into the tanks of each of its airplanes within the State of Wyoming for consumption in propelling such airplanes in its commerce as aforesaid, and on each and every gallon of gasoline consumed by the plaintiff in the State of Wyoming in its aforesaid commerce; that under the provisions of said acts the defendant, Treasurer of the State of Wyoming, and his respective deputies, agents, servants, attorneys, workmen and other employees are charged with and exercise the duty of collecting and disbursing the said tax as therein provided; that under the said statutes the penalties and liabilities, civil and criminal, against the plaintiff, its officers and employees for any failure in the payment of any tax demanded under said statute include among other things liability for double the

amount of the tax, liability to injunction against the plaintiff and its vendors, without bonds, such as would prevent the plaintiff from obtaining any gasoline, liability to have appointed for the plaintiff a receiver for its property and its business, liability on the part of its officers and employees to fine and imprisonment; denies that for a long time prior hereto the said defendant, State Treasurer, and his deputies, agents, servants, attorneys, workmen and/or employees have wrongfully and without authority of law required the said plaintiff to pay the said tax on each and every gallon of gasoline purchased or put into the tanks of its airplanes or used as aforesaid in the conduct of its said interstate commerce and business; admit that the said defendant, State Treasurer, and his respective deputies, [fol. 22] agents, servants, attorneys, workmen and/or employees still require and threaten to continue to require the payment of the said tax by the plaintiff; deny that the State Treasurer, and his respective deputies, agents, servants, attorneys, workmen and/or employees will wrongfully and unlawfully continue to exact and collect the said tax from the plaintiff unless enjoined and restrained from so doing by order of this court; admit that the defendant, his deputies, employees, and agents have already exacted from the plaintiff under the said statute, and the plaintiff to avoid on its own part and on that of its employees and officers the great penalties, civil and criminal, denounced by said statutes, has paid to the defendant, William H. Edelman, the following sums for gasoline put into its airplane tanks at Cheyenne and used in the aforesaid commerce, to-wit:

March 15, 1930	$424.08
April 12, 1930	455.96
May 10, 1930	651.68
June 14, 1930	549.64
July 15, 1930	666.24
August 13, 1930	698.40
September 11, 1930	724.48
October 13, 1930	668.92
November 15, 1930	689.88

Admit that said payments were made under protest; admit that the defendant, his deputies, employees, agents, etc.,

have likewise under the said statute demanded and exacted from the plaintiff, and the plaintiff to escape the extreme civil and criminal penalties of said statutes, has paid to the defendant, William H. Edelman, for gasoline placed in its airplanes at Rock Springs, used in such interstate commerce, the following sums, to-wit:

March 15, 1930	$181.00
April 12, 1930	240.28
May 10, 1930	256.32
June 14, 1930	275.00
July 15, 1930	314.04
August 13, 1930	322.32
September 11, 1930	363.04
October 13, 1930	355.60
November 15, 1930	418.72

admit that said payments were made under protest.

[fol. 23] 9. The defendant, in answer to Paragraph 10 of Plaintiff's Bill of Complaint, denies that the said statutes of Wyoming are unconstitutional, illegal and void in so far as they, or any or either of them, apply to plaintiff, and deny that the same directly burdens and interferes with interstate commerce, and deny that the said statutes as applied to plaintiff directly burdens and interferes with the said interstate commerce and business of plaintiff in transporting and carrying mail, passengers and/or express in interstate commerce by air; denies that the said tax is unconstitutional, illegal and void so far as it applies to plaintiff and its said business, and denies that said tax conflicts with, offends against and is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the several states, and denies that the said statutes purport to impose and levy, and denies that said statutes do impose and levy a tax on all gasoline purchased or consumed as fuel in Wyoming to propel airplanes flying between the said State and neighboring States in interstate commerce, and denies that said tax is enacted as the price of the privilege of using an instrumentality of interstate commerce and thus evading the exclusive power of Congress to regulate commerce between the several states.

10. The defendant, for answer to Paragraph 11 of Plaintiff's Bill of Complaint, admits that the City of Cheyenne, and the said defendant, the City of Rock Springs, and each of them, are municipal corporations organized and existing under the laws of the State of Wyoming and each of them is a citizen and resident of the State of Wyoming; that there is at each of the said municipal corporations a municipal air field, at each of which the airplanes used by the plaintiff land more or less regularly and more or less regularly are supplied with gasoline to be used as fuel in propelling its airplanes in interstate commerce as aforesaid. Defendant admits that the said statutes as construed by the defendants, and each of them, appropriate to this defendant, the City of Cheyenne, all funds received from the said gasoline license tax on gasoline taken into the airplanes of the plaintiff at Cheyenne for use by the plaintiff in such interstate commerce, and admits that such statutes direct such fund to be paid over to the said City of Cheyenne, and like-
[fol. 24] wise that all of the said taxes for gasoline taken into the plaintiff's airplanes at Rock Springs for use in the said interstate commerce are to be paid to the said City of Rock Springs, by reason whereof this defendant, The City of Cheyenne, is not only claiming the sums, and each of them that have been paid by this plaintiff to the defendant, Edelman, for gasoline so put into its airplanes at Cheyenne for use in said interstate commerce, but is also claiming that the plaintiff be compelled to continue such payments indefinitely for the future; and in like manner the said City of Rock Springs is not only claiming the sums, and each of them, that have been paid by this plaintiff to the defendant, Edelman, for gasoline so put into its airplanes at Rock Springs for use in said interstate commerce, but is also claiming that the plaintiff be compelled to continue such payments indefinitely for the future, and by reason of the said construction of the said statutes and the claims so as aforesaid made by and on behalf of the said City of Cheyenne and of the said City of Rock Springs, each of the said municipalities is a necessary party to the full determination of the constitutionality of the said statutes as aforesaid applied to this plaintiff; and the said City of Cheyenne is a necessary party to any full settlement and disposition of so much of this cause as applies to

the taxes already paid by the plaintiff for gasoline placed in its tanks at Cheyenne and used in interstate commerce as aforesaid, and the said City of Rock Springs is a necessary party to any full settlement and disposition of so much of this cause as applies to the taxes already paid by the plaintiff for gasoline placed in its tanks at Rock Springs and used in interstate commerce as aforesaid.

11. The defendant, for its answer to Paragraph 12 of plaintiff's Bill of Complaint, denies that if the exactions made from the plaintiff, as in said petition alleged, be held to be exactions of ordinary taxation upon the gasoline, as property owned by plaintiff, in order to produce revenue for public purposes, State, County and municipal, that such taxation would be illegal and void as violating the second provision of Section 28 of Article 1 of the Constitution of the State of Wyoming, which is in the following words:

"All taxation shall be equal and uniform."

and denies that such taxation is illegal and void as violating Section 11 of Article 13 of the Constitution of the State of Wyoming, which is in the following words:

[fol. 25] "All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

denies that said tax upon gasoline, as property owned by the plaintiff, is illegal and void because as to all other personalty within the State of Wyoming, the owner thereof, under the provisions of Section 2762, Wyoming Compiled Statutes, 1920, is taxed only upon the value of so much thereof as is owned by such owner on the first day of April of the then current year, while on the gasoline used by plaintiff as aforesaid the said license tax exacted from this plaintiff, as herein averred, is levied upon all gasoline bought or used by plaintiff during the year, although the plaintiff did not on April 1st, or on any other day, own as much as one-tenth part of the gasoline upon which the said tax is exacted as in this bill alleged.

Defendant admits that the highest amount of the ordinary tax for all purposes levied upon other personalty in any year in Cheyenne or in the county in which it is located, or in Rock Springs or in the county it is located or at any place in Wyoming, does not exceed four per centum of the value of such personalty, but denies the license tax levied against the gasoline used by this plaintiff in interstate commerce, exceeds twenty per centum of the value of all gasoline, not only on all that owned by the plaintiff on any one day but twenty per centum of all of that from time to time bought or used by the plaintiff in its said interstate commerce business in Wyoming, and denies that said license tax exacted from said plaintiff is illegal and void by reason thereof.

12. The defendant for its answer to Paragraph 13 of Plaintiff's Bill of Complaint, denies that each and every of the payments of said tax by the plaintiff has been paid solely in order that the plaintiff might be permitted to continue to use gasoline in propelling its said airplanes in such interstate commerce and business and in order to avoid irreparable loss and injury by the imposition upon the plaintiff and its officers, agents and employees of the penalties, civil and criminal, imposed by said acts, each and every of which penalties the defendant, Edelman, his deputies, agents, assistants, servants, etc., has threatened and still threatens to enforce and each of which the said defend- [fol. 26] ant personally and through his said agents, deputies, officers and assistants will enforce unless restrained and enjoined from so doing.

13. The defendant, for answer to Paragraph 14 of plaintiff's Bill of Complaint, denies that under the provisions of said statutes the wholesale distributors or consignees of gasoline are made agents of the State of Wyoming for the purpose of collecting said gasoline tax, said agents acting under the direction of the defendant, State Treasurer, and while the said distributors and/or consignees of gasoline actually collect, return and remit said tax to the State of Wyoming and to defendant, the State Treasurer, and denies that said gasoline tax is in law and in practice levied and imposed against the consumer of said gasoline within the State of Wyoming and not against the wholesale dis-

tributor or consignee, and such tax is paid by all such consumers, ordinarily direct to the defendant, the Treasurer of the State of Wyoming; and admits that said plaintiff has paid said tax in order to purchase or consume any gasoline in the State of Wyoming, and will hereafter be forced to pay until said defendant, his agents, servants, employees, workmen and other persons acting by and through him, are enjoined and restrained from collecting the same by order of this court.

14. The defendant, for its answer to Paragraph 15 of Plaintiff's Bill of Complaint, admits that under the laws of the State of Wyoming relief by injunction is a remedy afforded all persons as a remedy to enjoin the enforcement and/or collection of any illegal levy or any tax, charge or assessment and of any proceedings to enforce the same, and further alleges that the remedy by injunction sought by the plaintiff herein alone will afford to the plaintiff complete or speedy relief; that the plaintiff has no adequate remedy at law; that the entire controversy involved herein can be settled in one suit in equity in which much time and great expense will be saved and multiplicity of suits prevented, and that such results cannot, nor can any reasonable relief, be obtained by any remedy at law, either in a single suit brought by the plaintiff, or otherwise.

The defendant denies that under the provisions of said statutes the distributors, of such gasoline, and each of them is charged with the duty, as agents of the State of Wyoming, of collecting and returning the tax to defendant, State of Wyoming; admits that the plaintiff in order to continue [fol. 27] to operate its said airplanes in the conduct of its said business purchases from time to time and from day to day large quantities of gasoline in the State of Wyoming and that no such distributor or any other dealer in gasoline in said state will sell such gasoline to the plaintiff unless the plaintiff so purchasing the same shall make payment of said tax levied and assessed thereon at the time of the purchase thereof; and admits that plaintiff is unable to purchase any gasoline in the State of Wyoming for the operation or propulsion of its said airplanes without at the time paying the said tax thereon, and plaintiff alleges that by the express provisions of said acts and/or by the practical operation thereof and the legal effect thereof the said tax

is absorbed in the price paid for all gasoline purchased in Wyoming for use or consumption in the said state by the purchaser, including this plaintiff; and denies that under the provisions of said act the said tax, as so collected and returned to the state by the distributor of or dealer therein is both in practice and in legal effect a tax on the consumer of such gasoline; and denies that unless the injunctive relief herein sought by the plaintiff be granted the said interstate business of the plaintiff herein will be daily and constantly burdened, interfered with and damaged to its great and irreparable injury; and denies that by reason of the facts, as set forth in plaintiff's petition, it has no clear, adequate or complete remedy at law and denies that it will suffer irreparable damage and injury and be subject to a multiplicity of vexatious suits and litigation unless the enforcement and collection of said tax insofar as it applies to gasoline purchased and/or consumed by the plaintiff in the State of Wyoming as fuel for the operation of its said airplanes in interstate commerce and business, as aforesaid, is immediately enjoined and restrained by a temporary or interlocutory injunction granted by this court, as prayed for in plaintiff's petition, and unless defendant be upon final hearing of said cause perpetually enjoined and restrained from the collection and enforcement of said tax.

Defendant admits that the plaintiff has paid to the proper officers in Wyoming all license taxes justly and properly due from it upon all gasoline used by it locally in Wyoming.

15. This answering defendant, City of Cheyenne, further alleges that on July 1st, 1929, it entered into a written [fol. 28] agreement with plaintiff, a true copy of which agreement it attached hereto, marked Exhibit A and made a part hereof by this reference; that by said agreement this defendant leased to the plaintiff for a term of 25 years the four hangars and control house, belonging to the City, located on said field, at an annual rental of $3,000 and also a rectangular tract of land, known as "hangar space," 200 feet in depth and 700 feet in width, in the vicinity of the buildings heretofore mentioned for the purpose of providing space for the erection of further buildings; that the City also leased to said Company certain taxi-ways and hangar space for the sum of $1,050.00.

16. It was further agreed in said contract that the City was to keep up the field as a suitable, well regulated airplane landing field for the use of any and all planes of plaintiff, without any rental charge; that plaintiff was given the right to superintend, manage and operate the said field on behalf of defendant for not to exceed 12 years, employing a superintendent and caretakers; that the plaintiff company, under the direction of defendant should superintend the maintenance, and up-keep of the field and actually perform such maintenance, grading, dragging and leveling of the field and the repair of the lighting equipment, the City paying the actual cost thereof and the additional sum of $2,400 a year for all other services performed by plaintiff; that the defendant City agreed to assist in providing police necessary to enforce the City regulations, governing the use of the field and bound itself to expenditure of large amounts each year to maintain said field as one of the outstanding air ports of the West; that during the year 1930, the budget of the defendant City for its share of the expenses under said agreement was $6,650, which budget has proven inadequate for the many expenditures which the City has made in carrying out its covenants in said agreemnt; that for the superintendant's salary this defendant has paid $2,400; flood and beacon lights $316.03; for boundary lights $382.42; for the weather bureau $251.04; for moving lights $562.50; for grading $1,607.50; and miscellaneous, an expenditure of $1,153.21; a total expenditure of $6,845.48 up to the date of the filing of this answer; that the appropriations and expenditures of the defendant City of Cheyenne have increased each year and are as follows:

[fol. 29]

Year	Budget appropriations	Budget expenditures
1927	$500.00	$432.40
1928	7,000.00	7,602.37
1929	8,000.00	9,508.12

that such expenditures were made largely at the request of plaintiff and for its benefit; that such disbursements are made possible through the assistance of the gas tax complained of herein.

17. This defendant alleges that Chapter 14, Session Laws of Wyoming, 1929, enacted at the Special Session of the

Wyoming State Legislature, provided that the defendant State Treasurer should "pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the City or Town where such air field is located to be used for the maintenance and improvement of such air field;" that this answering defendant has received from said State Treasurer less than the amount set forth on Page Six of plaintiff's Bill of Complaint and received approximately up to this time $2,850.00; that all funds so received from the State Treasurer under the provisions of the statute set forth in this paragraph have been used solely and exclusively for the maintenance and development of said air port, or for the use and benefit of plaintiff herein; that no part of said tax on gasoline has been appropriated for any other purpose than the benefit of said air port and of plaintiff herein; that without the assistance of said funds received from the defendant State Treasurer it would be impossible to maintain and improve the air port, which is continually used by plaintiff, and that no part of the tax of which plaintiff complains, becomes available to any other fund of the City than that of the air port fund now carried separately on books of the City Treasurer and that no citizen of this Defendant City or of the State of Wyoming directly receives the benefit of said tax or any part thereof.

Wherefore, this defendant respectfully prays that the relief herein asked by the plaintiff be denied; that the collection of license tax upon the gasoline purchased and/or used by the plaintiff in its intrastate commerce and business and its interstate commerce and business in accord-
[fol. 30] ance with the provisions of the statutes of the State of Wyoming levying and authorizing the collection of said tax be decreed constitutional and legal, as against this defendant; that the petition of the plaintiff be dismissed and this defendant recover its costs herein and have such other and further equitable relief as to this court may appear proper.

The City of Cheyenne, a Municipal corporation, by
H. B. Henderson, Jr., Harry B. Henderson, Jr.

Duly sworn to by Harry B. Henderson, Jr. Jurat omitted in printing.

(For a copy of the contract annexed to the Answer see the copy included in the evidence at page 96 of this transcript.) Printed as Exhibit C at page 80.

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT, W. H. EDELMAN, STATE TREASURER—Filed Dec. 16, 1930

Comes now defendant, William H. Edelman, State Treasurer, and for his separate answer to the Bill of Complaint of the plaintiff, as filed in the above court, admits, denies and avers as follows:

1. This defendant, for answer to Paragraph 1 of Plaintiff's Bill of Complaint, for want of information sufficient [fol. 31] to form a belief, denies each and every allegation therein set forth.

2. This defendant, for answer to Paragraph 2 of said Bill of Complaint, admits that William H. Edelman is a citizen and resident of the State of Wyoming and is the duly elected, qualified and acting State Treasurer of the State of Wyoming.

3. This defendant, for his answer to Paragraph 3 of said Bill of Complaint, admits that this action is a suit of a civil nature; that the amount in controversy exceeds, exclusive of costs and interests, a sum in value of Three Thousand ($3,000.00) Dollars; denies that said action arises under the Constitution and laws of the United States; admits that the plaintiff by this action seeks to enjoin this defendant, William H. Edelman, as a state officer of the State of Wyoming, from collecting a tax levied and imposed by the State of Wyoming upon plaintiff; but denies that said tax, so levied and imposed is unconstitutional and illegal and denies that the imposition of said tax is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States. For want of information sufficient to form a belief, this defendant denies that the value of the right of the plaintiff to transact interstate business and commerce in and through the State of Wyoming is far in excess of Three Thousand Dollars, exclusive of interest

and costs; denies that plaintiff is, by reason of carrying on its said business, subject to an unconstitutional, illegal and void tax. This defendant further admits that, unless restrained by order of this court, he will collect from the plaintiff said tax, but denies that said tax is unconstitutional, illegal and invalid and denies that this defendant will collect any illegal and void tax in the amount of Three Thousand Dollars, exclusive of interests and costs, as set forth in this petition.

4. This defendant, in answer to Paragraph 4 of Plaintiff's Bill of Complaint, admits that for some time hitherto, plaintiff has been engaged in and has transacted interstate commerce and business in transporting passengers and express and United States mail by airplane for hire into, across and through the State of Wyoming from points out- [fol. 32] side the boundaries thereof and from points within the State of Wyoming to points outside the boundaries thereof and has transacted a small amount of similar business from points inside the State of Wyoming to other points within said state; but that for want of information sufficient to form a belief, denies that plaintiff intends to continue to carry on and transact interstate commerce and business in the State of Wyoming. Defendant denies that all of said business, as so set forth in said Paragraph 4, is intermingled in the same airplanes.

5. This defendant, for his answer to Paragraph 5 of Plaintiff's Bill of Complaint, admits that gasoline is used as fuel in said airplanes for the purpose of propelling the same; denies that gasoline purchased by and delivered to plaintiff and used by plaintiff, as said fuel, for the operation and propulsion of its said airplanes cannot be apportioned between the said two classes of business; and avers the fact to be that the gasoline purchased by and delivered to the plaintiff and used by the plaintiff as fuel for the operation and propulsion of its said airplanes can be apportioned between the said two classes of business, for the reason that the gasoline has been and is being apportioned, under agreement between plaintiff and this defendant as is evidenced by the fact that the gasoline used by the plaintiff in its interstate business is being kept in one tank at its airfields at Cheyenne and Rock Springs, respectively; and the gasoline used by the plaintiff in its intrastate business,

is kept in another and different tank at its airfields at Cheyenne and Rock Springs; and has been since on or about March 15, 1930; and the payment of the tax on the gasoline so used in interstate commerce and business has been paid separately and under protest since on or about said March 15, 1930, while the payment of the tax on the gasoline so used in intrastate commerce and business has been paid separately and without protest, since on or about said March 15, 1930; the said payments which were made under protest during said period being as follows:

[fol. 33]

	Receipt No.	Cheyenne Field	Rock Springs Field
March 20, 1930	886	$424.08	
" 20, "	885	.....	$181.00
April 14, "	888	455.96	
" 14, "	887	.....	240.28
May 12, "	889	651.68	
" 12, "	890	.....	256.32
June 16, "	892	549.64	
" 16, "	891	.....	275.00
July 17, "	894	666.24	
" 17, "	893	.....	314.04
Aug. 14, "	896	698.40	
" 14, "	895	.....	322.32
Sept. 12, "	898	724.48	
" 12, "	897	.....	363.04
Oct. 14, "	901	668.92	
" 14, "	900	.....	355.60
Nov. 18, "	902	689.88	
" 18, "	903	.....	418.72
		$5,529.28	$2,726.32
Total			$8,255.66

and the said payments which were made without protest during said period and paid over to said cities, being as follows:

Cheyenne Field

March	21, 1930	Receipt	60891	$158.84
April	14, "	"	61012	189.52
May	12, "	"	61497	150.08
June	16, "	"	62020	54.76
July	17, "	"	62562	144.72
Aug.	14, "	"	62995	98.88
Sept.	12, "	"	63419	204.00
Oct.	14, "	"	63969	381.88
Nov.	18, "	"	64454	310.88
				$1,693.56

[fol. 34]

Rock Springs Field

March	21, 1930	Receipt	60892	$7.44
April	14, "	"	61013	12.52
May	12, "	"	61498	25.24
June	16, "	"	62021	19.96
July	17, "	"	62561	41.76
Aug.	14, "	"	62994	41.16
Sept.	12, "	"	63418	73.56
Oct.	14, "	"	63970	70.84
Nov.	18, "	"	64453	28.44
				$320.92

Further answering the allegations of said paragraph 5 of plaintiff's bill of complaint, this defendant denies that said intrastate business and commerce and said interstate business and commerce are commingled and alleges the fact to be that the said intrastate business and commerce and said interstate business and commerce cannot be commingled. That for want of information sufficient to form a belief, denies that plaintiff knows of no other fuel which can be practically, conveniently or profitably used in connection with said business.

6. This defendant, for his answer to Paragraph 6 of said Bill of Complaint, admits that the plaintiff owns, operates and maintains airplanes in interstate commerce and business as aforesaid upon legally defined routes and sched-

ules; further admits that the motive power used by said airplanes, and each of them, being as aforesaid, is exclusively the use of gasoline as fuel.

7. This defendant, for answer to Paragraph 7 of Plaintiff's Bill of Complaint, admits that part of the gasoline used by plaintiff in its said business is purchased by and delivered to plaintiff in the State of Wyoming; admits that a part thereof is purchased outside of said state and that such gasoline purchased and delivered to the plaintiff either in or outside of said State of Wyoming is used and consumed by plaintiff as fuel for the propulsion of its said airplanes in its interstate commerce and business as aforesaid and alleges that a part of said gasoline as purchased by said plaintiffs is used in its intrastate commerce and business. This defendant denies said gasoline, purchased and used by the plaintiff, is an instrumentality of interstate commerce.

[fol. 35] 8. This defendant, for its answer to Paragraph 8 of plaintiff's Bill of Complaint, admits that in the said interstate commerce and business, some passengers, mail and express are transported and carried in intrastate business, but denies that intrastate business and interstate business are so commingled and denies that a separation of one from the other is not reasonable and practical; denies that they are commingled and denies that plaintiff's interstate passengers, mail and express business cannot be carried efficiently and economically in airplanes used exclusively in interstate commerce and denies that plaintiff's intrastate passengers, mail and express can not be carried likewise in airplanes used exclusively in intrastate commerce.

9. This defendant, for his answer to Paragraph 9 of Plaintiff's Bill of Complaint, admits that by divers acts of the Legislature of the State of Wyoming, to-wit, Chapter 73 of the Session Laws of Wyoming of 1923, entitled "An Act providing a license tax on gasoline, providing for the collection thereof, defining certain words or phrases, prescribing manner and methods of payment, fixing penalties for failure to make same, and providing for the disposition of said taxes"; together with Chapter 89 of the Session Laws of Wyoming of 1925, entitled "An Act to amend and

re-enact Sections 2, 3, and 5, Chapter 73, Session Laws of Wyoming, 1923, providing a license tax on gasoline and providing for the disposition of such license taxes, and display of price signs by dealers in gasoline and prescribing penalty for violation"; together with Chapter 70 of the Session Laws of Wyoming of 1927, entitled "An Act to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Sections 1 and 2, Chapter 89, Session Laws of Wyoming, 1925, and to amend and re-enact Section 4 of Chapter 89, Session Laws of Wyoming, 1925, relating to display of price signs by dealers and providing a penalty for violation thereof; providing a license tax on gasoline and for the collection and statement of the amount of tax collected"; together with Chapter 139 of the Session Laws of Wyoming of 1929, entitled "An Act to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended by Sections 1 and 2, Chapter 70, Session Laws of Wyoming, 1927, and to amend and re-enact Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted [fol. 36] by Section 3, Chapter 39, (89?) Session Laws of Wyoming, 1925, and to amend and re-enact Section 6, Chapter 73, Session Laws of Wyoming, 1923; providing for a license tax on gasoline, and for the collection and statement of the amount of tax collected; providing for the disposition of said taxes, and fixing penalties for violation of any of the provisions of this Act"; and Chapter 14 of the Session Laws of Wyoming enacted at the Special Session, 1929, entitled "An Act to amend and re-enact Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of Wyoming, 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, providing for a license tax on gasoline, and for the collection thereof and providing for statements of gasoline sold or used by wholesalers or users and the payment of the tax by them; and providing for the disposition of the tax from gasoline used on municipal air fields and fixing penalties for violation of any of the provisions of this Act"; and by the construction and interpretation of the said acts by the defendant and by the State of Wyoming and its officers the said State of Wyoming imposed and levied a tax of four cents per gallon on each and every gallon of

gasoline placed by the plaintiff, in its airplanes while within the State of Wyoming, whether purchased or delivered to it in the State of Wyoming, or elsewhere, and on each and every gallon of gasoline put into the tanks of each of its airplanes within the State of Wyoming for consumption in propelling such airplanes in its commerce as aforesaid, and on each and every gallon of gasoline consumed by the plaintiff in the State of Wyoming in its aforesaid commerce; that under the provisions of said acts the defendant, Treasurer of the State of Wyoming, and his respective deputies, agents, servants, attorneys, workmen and other employees are charged with and exercise the duty of collecting and disbursing the said tax as therein provided; that under the said statutes the penalties and liabilities, civil and criminal, against the plaintiff, its officers and employees for any failure in the payment of any tax demanded under said statute include among other things liability for double the amount of the tax, liability to injunction against the plaintiff and its vendors, without bond, such as would prevent the plaintiff from obtaining any gasoline, liability to have appointed for [fol. 37] the plaintiff a receiver for its property and its business, liability on the part of its officers and employees to fine and imprisonment; denies that for a long time prior hereto the said defendant, State Treasurer, and his deputies, agents, servants, attorneys, workmen and/or employees have wrongfully and without authority of law required the said plaintiff to pay the said tax on each and every gallon of gasoline purchased or put into the tanks of its airplanes or used as aforesaid in the conduct of its said interstate commerce and business; admit that the said defendant, State Treasurer, and his respective deputies, agents, servants, attorneys, workmen and/or employees still require and threaten to continue to require the payment of the said tax by the plaintiff; deny that the State Treasurer, and his respective deputies, agents, servants, attorneys, workmen and/or employees will wrongfully and unlawfully continue to exact and collect the said tax from the plaintiff unless enjoined and restrained from so doing by order of this court; admit that the defendant, his deputies, employees and agents have already exacted from the plaintiff under the said statute, and the plaintiff to avoid on its own part and on that of its employees and officers the

great penalties, civil and criminal, denounced by said statutes, has paid to the defendant, William H. Edelman, the following sums for gasoline put into its airplane tanks at Cheyenne and used in the aforesaid commerce, to-wit:

March 15, 1930	$424 08
April 12, 1930	455 96
May 10, 1930	651 68
June 14, 1930	549 64
July 15, 1930	666 24
August 13, 1930	698 40
September 11, 1930	724 48
October 13, 1930	668 92
November 15, 1930	689 88

Admit that said payments were made under protest; admit that the defendant, his deputies, employees, agents, etc., have likewise under the said statute demanded and exacted from the plaintiff, and the plaintiff to escape the extreme civil and criminal penalties of said statutes, has paid to the defendant, William H. Edelman, for gasoline placed in its airplanes at Rock Springs, used in such interstate commerce, the following sums, to-wit:

[fol. 38] March 15, 1930	$181 00
April 12, 1930	240 28
May 10, 1930	256 32
June 14, 1930	275 00
July 15, 1930	314 04
August 13, 1930	322 32
September 11, 1930	363 04
October 13, 1930	355 60
November 15, 1930	418 72

admit that said payments were made under protest.

10. This defendant, in answer to Paragraph 10 of Plaintiff's Bill of Complaint, denies that the said statutes of Wyoming are unconstitutional, illegal and void in so far as they, or any or either of them, apply to plaintiff, and deny that the same directly burdens and interferes with interstate commerce, and deny that the said statutes as applied to plaintiff directly burdens and interferes with the said interstate commerce and business of plaintiff in transport-

ing and carrying mail, passengers and/or express in interstate commerce by air; denies that the said tax is unconstitutional, illegal and void so far as it applies to plaintiff and its said business, and denies that said tax conflicts with, offends against and is in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States granting to Congress the exclusive power to regulate commerce between the several states, and denies that the said statutes purport to impose and levy, and denies that said statutes do impose and levy a tax on all gasoline purchased or consumed as fuel in Wyoming to propel airplanes flying between the said State and neighboring states in interstate commerce, and denies that said tax is enacted as the price of the privilege of using an instrumentality of interstate commerce and thus evading the exclusive power of Congress to regulate commerce between the several states.

11. This defendant, for his answer to Paragraph 11 of Plaintiff's Bill of Complaint, admits that the said defendant, the City of Cheyenne, and the said defendant, the City of Rock Springs, and each of th. m, are municipal corporations organized and existing under the laws of the State of Wyoming and each of them is a citizen and resident of the State of Wyoming; that there is at each of the said munic- [fol. 39] ipal corporations a municipal air field, at each of which the airplanes used by this plaintiff land more or less regularly and more or less regularly are supplied with gasoline to be used as fuel in propelling its airplanes in interstate commerce as aforesaid. Defendant admits that the said statutes as construed by the defendants, and each of them, appropriate to the said defendant, the City of Cheyenne, all funds received from the said gasoline license tax on gasoline taken into the airplanes of the plaintiff at Cheyenne for use by the plaintiff in such interstate commerce, and admits that such statutes direct such fund to be paid over to the said City of Cheyenne, and likewise that all of the said taxes for gasoline taken into the plaintiff's airplanes at Rock Springs for use in the said interstate commerce are to be paid to the said City of Rock Springs, by reason whereof the said defendant, The City of Cheyenne, is not only claiming the sums, and each of them that have been paid by this plaintiff to the defendant, Edelman, for gasoline so put into its airplanes at Cheyenne

for use in said interstate commerce, but is also claiming that the plaintiff be compelled to continue such payments indefinitely for the future; and in like manner the said City of Rock Springs is not only claiming the sums, and each of them, that have been paid by this plaintiff to the defendant, Edelman, for gasoline so put into its airplanes at Rock Springs for use in said interstate commerce, but is also claiming that the plaintiff be compelled to continue such payments indefinitely for the future, and by reason of the said construction of the said statutes and the claims so as aforesaid made by and on behalf of the said City of Cheyenne and of the said City of Rock Springs, each of the said municipalities is a necessary party to the full determination of the constitutionality of the said statutes as so as aforesaid applied to this plaintiff; and the said City of Cheyenne is a necessary party to any full settlement and disposition of so much of this cause as applies to the taxes already paid by the plaintiff for gasoline placed in its tanks at Cheyenne and used in interstate commerce as aforesaid, and the said City of Rock Springs is a necessary party to any full settlement and disposition of so much of this cause as applies to the taxes already paid by the plaintiff for gasoline placed in its tanks at Rock Springs and used in interstate commerce as aforesaid.

12. This defendant, for its answer to Paragraph 12 of [fol. 40] plaintiff's Bill of Complaint, denies that if the exactions made from the plaintiff, as in said petition alleged, be held to be exactions of ordinary taxation upon the gasoline, as property owned by plaintiff, in order to produce revenue for public purposes, State, County and municipal, that such taxation would be illegal and void as violating the second provision of Section 28 of Article 1 of the Constitution of the State of Wyoming, which is in the following words:

"All taxation shall be equal and uniform."

and denies that such taxation is illegal and void as violating Section 11 of Article 15 of the Constitution of the State of Wyoming, which is in the following words:

"All property, except as in this constitution otherwise provided, shall be uniformly assessed for taxation, and the

legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

denies that said tax upon gasoline, as property owned by the plaintiff, is illegal and void because as to all other personalty within the State of Wyoming, the owner thereof, under the provisions of Section 2762, Wyoming Compiled Statutes, 1920, is taxed only upon the value of so much thereof as is owned by such owner on the first day of April of the then current year, while on the gasoline used by plaintiff as aforesaid the said license tax exacted from this plaintiff, as herein averred, is levied upon all gasoline bought or used by plaintiff during the year, although the plaintiff did not on April 1st, or on any other day, own as much as one-tenth part of the gasoline upon which the said tax is exacted as in this bill alleged.

Defendant admits that the highest amount of the ordinary tax for all purposes levied upon other personalty in any year in Cheyenne or in the county in which it is located, or in Rock Springs or in the county in which it is located or at any other place in Wyoming, does not exceed four per centum of the value of such personalty, yet the license tax levied as herein alleged against the gasoline used by this plaintiff in interstate commerce, as herein shown, exceeds twenty per centum of the value of all gasoline, not only all that owned by the plaintiff on any one day but twenty per centum of all of that from time to time bought or used by the plaintiff in its said interstate commerce busi-
[fol. 41] ness in Wyoming; but denies that said license tax exacted from said plaintiff is illegal and void by reason thereof.

13. This defendant, for its answer to Paragraph 13 of Plaintiff's Bill of Complaint, denies that each and every of the payments of said tax by the plaintiff has been paid solely in order that the plaintiff might be permitted to continue to use gasoline in propelling its said airplanes in such interstate commerce and business and in order to avoid irreparable loss and injury by the imposition upon the plaintiff and its officers, agents and employees of the penalties, civil and criminal, imposed by said acts, each and every of which penalties the said defendant, his depu-

ties, agents, assistants, servants, etc., has threatened and still threatens to enforce and each of which the said defendant personally and through his said agents, deputies, officers and assistants will enforce unless restrained and enjoined from so doing.

14. This defendant, for answer to Paragraph 14 of plaintiff's Bill of Complaint, denies that under the provisions of said statutes the wholesale distributors or consignees of gasoline are made agents of the State of Wyoming for the purpose of collecting said gasoline tax, said agents acting under the direction of the defendant, State Treasurer, and while the said distributors and/or consignees of gasoline actually collect, return and remit said tax to the State of Wyoming and to the defendant, the State Treasurer, and denies that said gasoline tax is in law and in practice levied and imposed against the consumer of said gasoline within the State of Wyoming and not against the wholesale distributor or consignee, and such tax is paid by all such consumers, ordinarily direct to the defendant, the Treasurer of the State of Wyoming; and admits that said plaintiff has paid tax in order to purchase or consume any gasoline in the State of Wyoming, and will hereafter be forced to pay until defendant, his agents, servants, employees, workmen and other persons acting by and through him, are enjoined and restrained from collecting the same by order of this court.

15. This defendant, for its answer to Paragraph 15 of Plaintiff's Bill of Complaint, admits that under the laws of the State of Wyoming relief by injunction is a remedy afforded all persons as a remedy to enjoin the enforcement and/or collection of any illegal levy of any tax, charge or [fol. 42] assessment and of any proceedings to enforce the same, and further alleges that the remedy by injunction sought by the plaintiff herein alone will afford to the plaintiff complete or speedy relief; that the plaintiff has no adequate remedy at law; that the entire controversy involved herein can be settled in one suit in equity in which much time and great expense will be saved and a multiplicity of suits prevented, and that such results cannot, nor can any reasonable relief, be obtained by any remedy at law, either in a single suit brought by the plaintiff, or otherwise.

This defendant denies that under the provisions of said statutes the distributors of such gasoline, and each of them is charged with the duty, as agents of the State of Wyoming, of collecting and returning the tax to defendant, State of Wyoming; admits that the plaintiff in order to continue to operate its said airplanes in the conduct of its said business is compelled to purchase from time to time and from day to day large quantities of gasoline in the State of Wyoming and that no such distributor or any other dealer in gasoline in said state will sell such gasoline to the plaintiff unless the plaintiff so purchasing the same shall make payment of said tax levied and assessed thereon at the time of the purchase thereof; and admits that plaintiff is unable to purchase any gasoline in the State of Wyoming for the operation or propulsion of its said airplanes without at the time paying the said tax thereon, and plaintiff alleges that by the express provisions of said acts and/or by the practical operation thereof by the defendant and the legal effect thereof the said tax is absorbed in the price paid for all gasoline purchased in Wyoming for use or consumption in the said state by the purchaser, including this plaintiff; and denies that under the provisions of said act the said tax, as so collected and returned to the state by the distributor of or dealer therein is both in practice and in legal effect a tax on the consumer of such gasoline; and denies that unless the injunctive relief herein sought by the plaintiff be granted the said interstate business of the plaintiff herein will be daily and constantly burdened, interfered with and damaged to its great and irreparable injury; and denies that by reason of the facts, as set forth in plaintiff's petition, it has no clear, adequate or complete remedy at law and denies that it will suffer irreparable damage and injury and be subject to a multi-[fol. 43] plicity of vexatious suits and litigation unless the enforcement and collection of said tax insofar as it applies to gasoline purchased and/or consumed by the plaintiff in the State of Wyoming as fuel for the operation of its said airplanes in interstate commerce and business, as aforesaid, is immediately enjoined and restrained by a temporary interlocutory injunction granted by this court, as prayed for in plaintiff's petition, and unless defendant be upon final hearing of said cause perpetually enjoined and restrained from the collection and enforcement of said tax.

Defendant admits that the plantiff has paid to the proper officers in Wyoming all license taxes justly and properly due from it upon all gasoline used by it locally in Wyoming.

Wherefore, this defendant respectfully prays that the relief herein asked by the plaintiff be denied; that the collection of license tax upon the gasoline purchased and/or used by the plaintiff in its intrastate commerce and business and its interstate commerce and business in accordance with the provisions of the statutes of the State of Wyoming levying and authorizing the collection of said tax be decreed constitutional and legal, as against this defendant; that the petition of the plaintiff be dismissed; and this defendant recover its costs herein and have such other and further equitable relief as to this court may appear proper.

William O. Wilson, Attorney General of the State of Wyoming. J. A. Greenwood, Deputy Attorney General of the State of Wyoming. Richard J. Jackson, Assistant Attorney General of the State of Wyoming. P. S. Garbutt, Assistant Attorney General of the State of Wyoming.

Duly sworn to by Charles B. Morgan. Jurat omitted in printing.

[fol. 44] In United States District Court

[Title omitted]

Supplemental Bill of Complaint—Filed May 26, 1931

Comes now the plaintiff, Boeing Air Transport, Inc., and for its Supplemental Bill of Complaint, withdrawing no part of its original Bill of Complaint nor its action as to any of the defendants named therein, complaining of Harry R. Weston in addition to the matters charged against the several defendants as shown in its original bill of complaint, alleges that since the commencement of this action and during its progress, to-wit, on the 5th day of January, 1931, the said defendant, Harry R. Weston, having been duly elected thereto, took the office of State Treasurer of the State of Wyoming, which office he now lawfully and duly holds.

And the plaintiff now alleges against said Harry R. Weston each and every matter in the said original Bill of Complaint alleged against the said defendant, William H. Edelman, save the allegations in said original Bill contained in tables on pages 6 and 7 of said Bill stating the dates and amounts of money received by the said William H. Edelman.

And plaintiff alleges that the plaintiff to avoid on its part and that of its employees and officers the great penalties, civil and criminal, denounced by said statutes, has paid to the defendant, Harry R. Weston, as such, claimed gasoline tax, under proper and sufficient protest, the following sums for gasoline put into its airplane tanks at Cheyenne and used in its interstate commerce, to-wit:

[fol. 45] January 9, 1931	$762.68
February 14, 1931	820.12
March 9, 1931	707.28
April 13, 1931	806.16
May 12, 1931	1,002.44

And the defendant, Harry R. Weston, his deputies, employees, agents, etc., have likewise under the said statute demanded and exacted from the plaintiff under the said statute, and the plaintiff to escape the extreme civil and criminal penalties of said statute, has paid to the defendant, Harry R. Weston, under proper and sufficient protest, for gasoline placed in its airplanes at Rock Springs, used in such interstate commerce, the following sums, to-wit:

January 9, 1931	$488.48
February 14, 1931	492.00
March 9, 1931	507.20
April 13, 1931	490.84
May 12, 1931	550.32

Wherefore, plaintiff prays that each and every relief by plaintiff asked against the original defendants in its original Bill may be granted not only as against the said original defendants but also as against the said defendant, Harry R. Weston, and all other proper relief.

John W. Lacey, Attorney for Plaintiff.

Duly sworn to by D. B. Colyer. Jurat omitted in printing.

[fol. 46] IN UNITED STATES DISTRICT COURT

STIPULATION RE SUPPLEMENTAL BILL OF COMPLAINT—Filed May 26, 1931

It is hereby consented to and agreed by and between counsel in said cause subject to the approval of the court that the plaintiff may file a supplemental Bill of Complaint in said cause, setting out payments of the gasoline tax complained of, made to Harry R. Weston, State Treasurer, and alleging against said Weston by reference to the original Bill and not by the statement at large such facts as the plaintiff may desire to allege against the said Weston.

It is further stipulated and agreed that the answer heretofore filed in said cause by the defendant Edelman may stand and be taken also as an answer by the defendant Weston.

Dated this 25th day of May, A. D. 1931.

John W. Lacey, Attorney for Plaintiff. J. A. Greenwood, Attorney General of the State of Wyoming, Attorney for defendants Edelman and Weston.

IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO FILE A SUPPLEMENTAL BILL OF COMPLAINT MAKING HARRY R. WESTON, TREASURER OF THE STATE OF WYOMING, A PARTY DEFENDANT—Filed May 26, 1931

Comes now said plaintiff and files its application for leave to make Harry R. Weston, State Treasurer of the State of Wyoming, a party defendant, and therewith presents a Supplemental Bill of Complaint, making its allegations of fact against the said Harry R. Weston by referring to the allegations of fact in said original Bill of Complaint.

And the court being sufficiently advised does now give leave to file said Supplemental Bill of Complaint in the form presented.

Dated this 26 day of May, A. D. 1931.

T. Blake Kennedy, Judge.

[fol. 47] IN UNITED STATES DISTRICT COURT

Findings of Fact, Conclusions of Law and Decree—Filed July 23, 1931

The above entitled cause was heretofore heard by the Court upon the pleadings, the evidence and the arguments of counsel and taken under advisement by the court.

And the court having heard and considered the said pleadings and evidence and the arguments of counsel, and being now sufficiently advised, does upon the matters involved make the following findings of fact, conclusions of law and decree.

I

FINDINGS OF FACT

1. The court finds that no application was made by any party to this cause for any hearing upon the prayer for an interlocutory injunction, and further finds that the case proceeded to final hearing before a single judge, without objection on the part of any party to the cause, and that the plaintiff waived its application for an interlocutory injunction as contained in its bill of complaint, which waiver was consented to and acquiesced in by all of the defendants.

And the court finds that the plaintiff is a corporation organized and existing under the laws of the State of Washington and duly authorized to do business of the kind mentioned in the Bill of Complaint, in and through the State of Wyoming, and is a citizen and resident of said State of Washington.

2. That the defendants William H. Edelman and Harry R. Weston are citizens and residents of the State of Wyoming, and that at the time of the filing of the Bill of Complaint the defendant William H. Edelman was an officer of the State of Wyoming, namely, the duly elected, qualified and acting State Treasurer of the State of Wyoming, and that later, to-wit, on the 5th day of January, 1931, the said defendant Harry R. Weston, having theretofore been duly elected, became the qualified and acting State Treasurer of the State of Wyoming.

3. That the defendant, The City of Cheyenne, and the defendant, The City of Rock Springs, and each of them, are municipal corporations, organized and existing under the

laws of the State of Wyoming, and each of them is a citizen [fol. 48] and resident of the State of Wyoming; that at Cheyenne there is a municipal air field owned by Cheyenne, at which the airplanes used by the plaintiff land more or less regularly, and more or less regularly are supplied with gasoline to be used as fuel in propelling its airplanes in its interstate commerce; that at Rock Springs there is a municipal air field leased by said last named City from the United States of America at a rental of $10.00 per annum, at which the airplanes used by the plaintiff land more or less regularly, and more or less regularly are supplied with gasoline to be used as fuel in propelling its airplanes in its interstate commerce.

That the State of Wyoming, through its State Treasurers, is insisting upon payment of all the taxes in controversy in this cause, and the said City of Cheyenne is claiming the taxes paid by the plaintiff for gasoline put into plaintiff's airplanes at Cheyenne for use in its interstate commerce, and is insisting that the collection of the same for the use of said City be continued. Likewise the City of Rock Springs is claiming the taxes paid by the plaintiff for gasoline put into plaintiff's airplanes at Rock Springs for use in its interstate commerce, and is insisting that the collection of the same for the use of said City be continued. And the said City of Cheyenne and the said City of Rock Springs are proper and necessary parties to this action.

4. That the plaintiff's suit exhibited by its Bill of Complaint and by its evidence is a suit of a civil nature and arises under the Constitution and laws of the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum and value of Three Thousand Dollars.

That the action is one in which the plaintiff seeks to enjoin the defendant William H. Edelman and the defendant Harry R. Weston, State officers of the State of Wyoming as above found, from collecting a tax which plaintiff claims is an unconstitutional and illegal tax levied and imposed by the State of Wyoming upon the plaintiff in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, and that the value of the alleged right of the plaintiff to transact interstate business and commerce in and through the State of Wyoming without being subjected to such tax is in excess of Three Thousand Dollars

exclusive of interest and costs; that unless the defendants be restrained from the collection of such tax, plaintiff [fol. 49] would be forced to pay to the defendants William E. Edelman and his successor, Harry R. Weston, such taxes at each of said fields in an amount in excess of Three Thousand Dollars exclusive of interest and costs, in order to carry on its interstate business and commerce as hereinafter found.

5. That the plaintiff is now and for a long time hitherto has been engaged in, and intends to continue to carry on and transact interstate commerce and business in transporting passengers, express and United States mail by airplane, for hire and profit, into, across and through the State of Wyoming from points outside the boundaries thereof, and from points within the State of Wyoming to points outside the boundaries thereof, with a small amount of similar business, hereinafter referred to, from points inside said State of Wyoming to other points within said State.

6. That the fuel used in propelling the plaintiff's airplanes is gasoline exclusively; that the substantial portion of plaintiff's business is interstate; that the Wyoming intrastate transportation of mails, passengers and express is an insignificant percentage of its entire business, so that it would be impractical and impossisble to determine or estimate the relative amount of gasoline which would be consumed in carrying on its intrastate business.

7. That the plaintiff owns, operates and maintains airplanes in said interstate commerce and business upon regularly defined routes and schedules, the motive power used by its airplanes, and each of them, being exclusively the use of gasoline as fuel, as aforesaid.

8. That part of such gasoline used by the plaintiff is purchased by and delivered to plaintiff in the State of Wyoming; that a part thereof is purchased outside of said State, and all thereof as purchased is deposited in tanks at said municipal airports in Wyoming, and that such gasoline as is used and consumed by plaintiff as fuel for the propulsion of its said airplanes in its said interstate commerce and business is an instrumentality of interstate commerce. To which finding the defendants, and each of them, now object and except.

9. That the said interstate business and commerce and the said intrastate business and commerce are carried in [fol. 50] the same planes, and that the said intrastate business could not be pratically or economically carried in separate planes.

10. That the plaintiff offers for sale and sells gasoline at retail prices to customers desiring to purchase the same at either of the municipal landing fields here involved and collects from such customers so purchasing gasoline the retail price charged therefor, including the amount of the State tax levied under the statute of the State of Wyoming.

That the plaintiff has paid without protest the tax of four cents per gallon on all gasoline sold by it in Wyoming and on all gasoline used by it in Wyoming other than that used in its said interstate commerce, and the said taxes so paid without protest have been paid over to the said City of Cheyenne and the said City of Rock Springs in accordance with their respective rights therein.

That plaintiff's unprotested payments of such taxes on gasoline sold and/or used by plaintiff in Wyoming, are as follows, to-wit:

On that sold and/or used at Cheyenne:

March 15, 1930	$158.84
April 12, 1930	189.52
May 10, 1930	150.08
June 4, 1030	54.76
July 15, 1930	144.72
Aug. 13, 1930	98.88
Sept. 11, 1930	204.00
Oct. 13, 1930	381.88
Nov. 15, 1930	310.88
Dec. 13, 1930	347.40
Jan. 9, 1931	198.20
Feb. 14, 1931	210.56
March 9, 1931	212.72
April 13, 1931	225.04
May 2, 1931	276.56
June 5, 1931	310.60

[fol. 51] On that sold and/or used at Rock Springs:

March 15, 1930	$7.44
April 12, 1930	12.52
May 10, 1930	25.24
June 14, 1930	19.96
July 15, 1930	41.76
August 13, 1930	41.16
Sept. 11, 1930	73.56
Oct. 13, 1930	70.84
Nov. 15, 1930	28.44
Dec. 13, 1930	22.64
Jan. 9, 1931	20.56
Feb. 14, 1931	24.00
March 9, 1931	15.24
April 13, 1931	17.28
May 2, 1931	17.92
June 5, 1931	15.68

The plaintiff has likewise paid all ordinary taxes that have accrued on all its property within the State of Wyoming.

11. That on the 1st day of July, A. D. 1929, the said City of Cheyenne and the plaintiff herein entered into a contract in writing concerning the Cheyenne airport and landing field, which provided, among other things,

(a) That the said City let to the plaintiff for the term of twenty-five years from the date of said contract four hangars and a control house at said airport, described in said contract, and the plaintiff agreed to pay for the use of said buildings the sum of $3,000.00 per year, and to keep said buildings insured at its own expense.

(b) That said City let to the plaintiff for the term of twenty-five years from the date of said contract, a certain rectangular tract of land described in said contract as hangar space, and the plaintiff agreed to erect thereon a building to cost not less than $50,000.00, in connection with which the City also let to the plaintiff certain described taxiways in connection with the said buildings and the said hangar space, and the plaintiff agreed to maintain, repair, [fol. 52] and, if necessary for its use, improve the said taxi-

ways, and at its own expense furnish such light thereon as might be necessary for its own use.

And the plaintiff further agreed to pay to the said City an annual rental of $1,050.00 for said hangar space and taxi-ways.

(c) In and by said contract the plaintiff and the said City of Cheyenne agreed that all of the space at said municipal air field, after excluding therefrom that portion covered by the buildings, hangar-space and taxi-ways aforesaid, should constitute a landing field, and the City agreed to keep the said landing field during the term of said agreement and during the entire period in which the plaintiff might occupy any portion of said municipal field as a tenant of said City, as a suitable, well-maintained and well regulated airplane landing field for the reasonable use of any and all planes and/or airships operated by the plaintiff. And the said City further agreed that the plaintiff should have rights on said landing field and on the municipal field equal to those granted to any other user.

(d) In and by said contract it was further agreed that the said landing field as it had theretofore existed should be enlarged by adding a new area already owned by the City, and that the plaintiff and the said City should proceed to grade and prepare said new area to be included, and extend the lighting system around the same, and agreed that the cost of all the work of preparing and grading the said new area and the cost of the new lighting equipment and the installation thereof should be divided equally between the parties, the total cost not to exceed $7,000.00.

(e) In and by said contract the City further agreed to use all reasonable efforts to acquire, at its own expense, the land included within an additional area described in said contract, and after acquiring the same and during the entire period in which the plaintiff might make any use of said municipal field under the provisions of said contract, agreed that it would keep all of said new area, or as much thereof as it might acquire free from all buildings and obstructions. And the said defendant, the City of Cheyenne, by the said contract obligated itself to provide and maintain its said airport landing field and permit the plaintiff unlimited, but not

exclusive use thereof in connection with its business; and the [fol. 53] defendant, the City of Cheyenne, has expended substantial sums of money in improving said airport landing field and maintaining the same, and will be compelled to spend additional substantial sums for the same purpose, and that the plaintiff is the chief user of said field at Cheyenne.

(f) And in and by said contract the City of Cheyenne further agreed that the plaintiff should be entitled to the full, but not exclusive use of said municipal field and landing field during the term of said agreement on terms as favorable as might be granted by the City to any other used thereof, and that no charge for any use which it might make thereof should be exacted from the plaintiff additional to that in said contract specifically provided.

(g) And that the plaintiff should receive in full for all services performed by it in superintending the municipal field and landing field and in directing traffic thereon and in providing supervising officers and caretakers and in full for all office expense and time of officers and accounting, and in full for operating and lighting equipment, and in full for directing the maintenance and upkeep of the municipal field, the sum of twenty-four hundred dollars ($2,400.00) per year.

It was further agreed in said contract that the plaintiff should, under the City's direction, perform all of the actual work of maintaining the municipal field, including the grading, dragging, conditioning and leveling of the landing field and the maintenance and repair of the lighting equipment, and that the City should pay to the plaintiff the actual cost thereof to the plaintiff, excluding all charges for services performed by the plaintiff in superintendence, etc., the payment for such superintendence, etc., being $2,400.00 per annum, as above stated.

12. On the 21st day of July, 1930, the said City of Rock Springs and the plaintiff herein entered into a contract in writing, which provided, among other things,

(a) That the City let to the plaintiff for the period of twenty years the non-exclusive use of its municipal airport and landing field, the plaintiff to pay to the said City

$600.00 per year for use of the said air field and of a parcel of land 300 feet by 150 feet on which the plaintiff was to erect a building or hangar for its use in handling its business on said airport, the plaintiff also to keep the buildings [fol. 54] thereon insured for and on behalf of the City at eighty per cent of the value thereof; to operate at its own expense and without cost to the City all lighting equipment on said field; to keep all such lighting equipment in good, serviceable condition at its own expense; to operate and maintain at its own expense all additional lighting equipment placed upon said air field with the consent of the City; to supervise, manage and maintain said airport and air field and the improvements and equipment thereon without expense to the City.

And it was further agreed in the contract with each of said cities that the City should impose no charges of any kind or character upon materials and/or products furnished or otherwise acquired by the plaintiff for use on said airport, nor should any charge be imposed by said City for materials and/or products prior to their acquisition by the said lessee.

By said contract the said City of Rock Springs further agreed that it should bear all expense incident to the maintenance and upkeep of said airport and the improvements and equipment thereon except as otherwise in said contract specifically provided.

Said contract also contains the following specific provisions:

"The lessee (the plaintiff here) agrees to supervise and manage said landing field for and on behalf of the lessor and under the direction of said lessor. The lessee further agrees to supervise and manage on behalf of the lessor and under the direction of the lessor the maintenance and upkeep of said landing field and the improvements and equipment thereof; said supervision and management to be without cost to the said lessor.

"It is agreed that the lessee may at its option and after giving the lessor 90 days notice, terminate its obligation and duty to supervise and manage said landing field and airport and the maintenance and upkeep thereof. It is agreed that if the lessee shall terminate its obligation and duty to supervise and manage said landing field and air-

port, as aforesaid, that the annual rental to be paid by the lessee hereunder shall be increased not more than Thirty-six Hundred Dollars ($3,600.00), during entire term of lease."

13. And the court finds that the charge for gasoline taxes [fol. 55] against the plaintiff for gasoline placed in its airplanes at Cheyenne and used in interstate commerce as aforesaid, was not in any wise, nor was any part thereof exacted from the plaintiff in or by the said contract between the plaintiff and the City of Cheyenne, nor were the same or any part thereof chargeable against the plaintiff at the time when said contract was made with the City of Cheyenne. To which finding the defendants, and each of them, now object and except.

14. On December 21, 1929, the Legislature of the State of Wyoming enacted the statute which (if the same be valid against the plaintiff in relation to the matters here involved) for the first time required the payment of such taxes on the gasoline placed in plaintiff's airplanes at Cheyenne and used by plaintiff as aforesaid in interstate commerce, which statute, if valid as against plaintiff as to said gasoline used in interstate commerce, made such taxes collectible for the use and benefit of the defendant, the City of Cheyenne.

And the court finds that the said plaintiff has in all respects performed its said contracts, and each of them, and that the same, and each of them, are in full force. To which finding the defendants, and each of them, now object and except.

15. And the court finds that the said plaintiff, to avoid on its own part and on that of its employees and officers the penalties, civil and criminal, denounced by the Wyoming statute against those failing to pay the said taxes, paid to the defendant, William H. Edelman, under full, proper and suffiicent protest the following sums for gasoline put into its airplane tanks at Cheyenne, and used as aforesaid in the said interstate commerce, to-wit:

March 15, 1930	$424.08
April 12, 1930	455.96
May 10, 1930	651.68
June 14, 1930	549.64

July 15, 1930	666.24
August 13, 1930	698.40
September 11, 1930	724.48
October 13, 1930	668.92
November 15, 1930	689.88
December 13, 1930	661.80

[fol. 56] And likewise, to escape the said penalties, civil and criminal, paid to the defendant, William H. Edelman, under full, proper and sufficient protest, for gasoline placed in its airplanes at Rock Springs, used in such interstate commerce, the following sums, to-wit:

March 15, 1930	$181.00
April 12, 1930	240.28
May 10, 1930	256.32
June 14, 1930	275.00
July 15, 1930	314.04
August 13, 1930	322.32
September 11, 1930	363.04
October 13, 1930	355.60
November 15, 1930	418.72
December 13, 1930	386.20

And in like manner the plaintiff paid to the defendant, Harry R. Weston, after he became State Treasurer, solely for the purpose of avoiding the aforesaid penalties, and under proper and sufficient and full protest, the following sums for gasoline put into its airplane tanks at Cheyenne and used in its said interstate commerce, to-wit:

January 9, 1931	$762.68
February 14, 1931	820.12
March 9, 1931,	707.28
April 13, 1931	806.16
May 12, 1931	1,002.44

And likewise, in order to escape the said penalties, the plaintiff, under proper, full and sufficient protest, paid to the defendant, Harry R. Weston, after he became State Treasurer, for gasoline placed in its airplanes at Rock Springs, used in such interstate commerce, the following sums, to-wit:

January 9, 1931	$488.48
February 14, 1931	492.00
March 9, 1931	507.20
April 13, 1931	490.84
May 12, 1931	550.32

16. And the court finds that during the period when these taxes were so as aforesaid collected the highest amount of ordinary tax for all purposes levied upon other personalty [fol. 57] in any year in Cheyenne, or in the County in which it is located, or in Rock Springs, or in the county in which it is located, or at any other place in Wyoming, did not exceed four per centum of the value of such personalty as was owned on April 1st of the year of such levy by the person against whom the tax was levied, but the license tax against the gasoline used by the plaintiff in interstate commerce as above found exceeds twenty per centum of the value of all gasoline, not only all that owned by the plaintiff on any one day but twenty per centum of all that from time to time bought or used by the plaintiff in said interstate commerce business in Wyoming, although the plaintiff did not on April first of any year, or on any other day, own as much as one-tenth part of the gasoline upon which the said tax was exacted.

That the said State of Wyoming by virtue of the provisions of Chapter 73, Session Laws of Wyoming, 1923; Chapter 89, Session Laws of Wyoming, 1925; Chapter 70, Session Laws of Wyoming, 1927; Chapter 139, Session Laws of Wyoming, 1929; Chapter 14, Session Laws of Wyoming, 1929, Special Session, to the extent that the same are valid concerning the gasoline used in interstate commerce, as herein found, through the State Treasurers of the State of Wyoming imposes and collects a tax per gallon upon all gasoline used by plaintiff at the municipal air field at Rock Springs and on all that used by plaintiff at the municipal air field at Cheyenne, Wyoming, including the gasoline placed by plaintiff in its airplanes at said fields used in both interstate and intrastate business.

That the plaintiff has segregated that portion of the gasoline used by it in propelling its airships in interstate commerce from the gasoline used and/or sold by it for other purposes at said municipal air fields.

17. The protested taxes here involved are still retained by the Treasurers to whom paid, that is to say, those paid to the defendant Edelman are still retained by him, and those paid to the defendant Weston are still retained by him.

The non-protested taxes on gasoline, being taxes on gasoline used otherwise than in interstate commerce, have been paid to the said cities respectively, the amount of such non-protested taxes upon gasoline used at the municipal airport at Cheyenne being by the Treasurer paid over to the [fol. 58] said City of Cheyenne, and the amount of such non-protested taxes upon gasoline used at the municipal airport at Rock Springs being by the Treasurer paid over to the said City of Rock Springs. The amount of such money so received by the City of Cheyenne is retained in a separate fund for the use of the said air field. During the years last past not all of the money so received and so retained in this separate fund by the City of Cheyenne has been expended, but all of the same that was actually expended was expended in connection with its said airport. The amount of such non-protested taxes received by the City of Cheyenne when added to the rentals received by said City from the plaintiff under the aforesaid contract exceeded the expense to said City of the maintenance of said air field and its supervision, during the specific time covered by the evidence in this cause.

The municipal airport at the City of Rock Springs was maintained and supervised at the sole expense of the plaintiff and without expense to said City of Rock Springs, and the plaintiff in addition has paid to the said City of Rock Springs for the use of said airport at the rate of $600.00 per annum. During the specific time covered by the evidence in this cause the amount of such non-protested taxes received by the City of Rock Springs, when added to the rentals received by the said City from the plaintiff under its aforesaid contract, exceeded the expense to said City of the maintenance of said air field and its supervision.

18. At the recent popular election in Cheyenne a bond issue was voted upon and approved by the people, authorizing the expenditure of $15,000.00 for various purposes in connection with the improvement of its municipal air field.

19. That the gasoline upon which the tax was paid under protest was held in storage tanks owned by the plaintiff at said municipal airports, and the gasoline thus stored was at all times subject to such use as plaintiff might desire to make thereof.

20. That the plaintiff, in the operation of its air transport line operates upon regular schedule between Chicago, Illinois, and San Francisco, California, and enjoys in connection with such operations a contract with the United States Government for the transportation of United States mail and also transports in its airplanes upon such regular [fol. 59] schedule between said designated points and intermediate points, passengers and express for hire.

21. That in the operation of its airlines, it makes use of the municipal air landing fields located at Cheyenne, Wyoming, and at Rock Springs, Wyoming, at which points its planes are landed on schedule for discharge and reception of mail, passengers and express and to be refueled, examined and conditioned.

22. That the defendants, City of Cheyenne and City of Rock Springs, have each entered into agreements with the plaintiff whereby they have obligated themselves to provide and maintain said airport landing fields and to permit the plaintiff unlimited but not exclusive use thereof in connection with its business.

23. That said tax of four cents per gallon on gasoline imposed upon the plaintiff, is likewise imposed upon others similarly situated, with the uniform application. To which finding, and to each separate matter therein, the plaintiff now at the time when the same is made excepts.

24. That the plaintiff's gasoline upon which such tax is imposed, has not previously been subjected to such tax, either within or without the State of Wyoming. To which finding, and to each separate matter therein, the plaintiff now at the time when the same is made excepts.

II

Conclusions of Law

And upon the facts found as aforesaid the court makes the following conclusions of law, to-wit:

1. That the statute of December 21, 1929, so far as the same levies, or attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne, and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid under the facts and circumstances above found. To which finding and conclusion of law the plaintiff now at the time excepts.

And the court finds that the statute of December 21, 1929, so far as the same levies, or attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes [fol. 60] at Rock Springs, and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid under the facts and circumstances above found. To which finding and conclusion of law the plaintiff now at the time excepts.

2. (a) That this action by the plaintiff so far as relates to the collection and threatened collection under the Wyoming Statute of December 21, 1929, of the tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used in propelling said airplanes in plaintiff's interstate commerce, should be dismissed on the merits. To which finding and conclusion of law the plaintiff now at the time excepts.

(b) That this action by the plaintiff so far as relates to the collection and threatened collection under the Wyoming Statute of December 21, 1929, of the tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Rock Springs and used in propelling said airplanes in plaintiff's interstate commerce, should be dismissed on the merits. To which finding and conclusion of law the plaintiff now at the time excepts.

III

Decree

It is therefore considered, ordered and adjudged by the court that as to the taxes on gasoline complained of taken into plaintiff's airplanes at Cheyenne as an instrumentality of interstate commerce, the injunction prayed for is

denied, and this cause is dismissed on the merits at the cost of the plaintiff. To which decree and order of the court, and to each matter therein, the plaintiff now at the time excepts.

It is further considered, ordered and adjudged by the court that as to the taxes on gasoline complained of taken into plaintiff's airplanes at Rock Springs as an instrumentality of interstate commerce, the injunction prayed for is denied, and this cause is dismissed on the merits at the costs of the plaintiff. To which decree and order of the court, and to each matter therein, the plaintiff now at the time excepts.

It is further ordered and decreed that the defendants, and each of them, do go hence without day and do have and recover of and from the plaintiff their costs herein, to be [fol. 61] taxed. To which order and decree and to each part thereof the plaintiff now at the time excepts.

And the plaintiff now prays an appeal herein to the United States Circuit Court for the Tenth Judicial Circuit, which prayer is now granted by the court.

And the court now fixes the sum of $500.00 as the amount in which the plaintiff shall file its undertaking and bond, with proper surety, to be approved by this court, for the payment of costs on said appeal.

Dated this 23d day of July, A. D. 1931.

T. Blake Kennedy, Judge.

O. K. J. A. Greenwood, Atty. Gen., one of Attys. for Deft. State Treasurer of Wyo.

In United States District Court

Statement of Evidence—Filed Oct. 14, 1931

Under Federal Equity Rule No. 75 (b)

Lodged with Clerk Aug. 20, 1931

The following is appellants condensed statement in narrative form of the evidence given upon the trial of said cause. This is made pursuant to Equity Rule No. 75 (b)

and lodged in the Clerk's office for examination by defendants as provided by said Rule.

EVIDENCE

For the purpose of this trial the defendants admit that the plaintiff is a corporation authorized to do business in Wyoming, as alleged in the petition.

Testimony of HUGH COFFMAN, a witness called on behalf of plaintiff:

Direct examination:

I am Transfer Clerk on behalf of the United States Government at the air field at Cheyenne and know what mail is handled by plaintiff through that field. The mail delivered at Rock Springs and taken up at Rock Springs for de- [fol. 62] livery elsewhere runs from one letter to twelve by each plane. Twelve would be a very large amount. Nothing originates at Rock Springs for Cheyenne. Practically all from Cheyenne to Rock Springs comes from outside of Wyoming and is interstate. The Rock Springs mail comes from Chicago, Omaha, Lincoln and North Platte, and I put it into a small pouch for Rock Springs. The pouch with its contents averages a pound and four ounces in weight. The pouch with its lock weighs thirteen ounces. The mail for Rock Springs and that for Los Angeles are put in the same compartment.

Cross-examination:

The Rock Springs mail is in the same mail pit with other mail going to other points but is in a separate pouch. I deliver the mail to the employee of the Boeing Company. No other mail goes to Rock Springs except that in the Rock Springs pouch. I know nothing about the express going to Rock Springs from other points. No mail goes east from Rock Springs. The only mail to Rock Springs is sent from Cheyenne. None is from other points in the State. It is from Cheyenne and from points south and east. There is no mail pouch from Rock Springs to Cheyenne. The mail from Rock Springs is never handled by the Boeing Company until it reaches Cheyenne. It comes to Cheyenne by

eastbound trains and is sent to the field at Cheyenne. No mail from Rock Springs addressed to points east is received at Rock Springs by the Boeing Company and carried to Salt Lake for transfer. Trains coming from the north and from Denver to Cheyenne and all trains centering at Cheyenne send all of their mail to the air field, and this pouch with Rock Springs mail as made up never exceeds twelve letters. Practically all of that comes from the east and south interstate. The Boeing planes going east do not stop at Rock Springs and carry no mail east from Rock Springs.

D. B. COLYER, a witness called on behalf of the plaintiff, testified:

I am Vice-President in charge of operations of the plaintiff.

Witness identifies the Certificate with the Government under which plaintiff carries mail and said Certificate was [fol. 63] admitted in evidence, marked Exhibit A. The same, omitting the recitals of statutes, authority, etc., and omitting signatures, is as follows:

EXHIBIT A

"Now, Therefore, pursuant to the authority in me vested by the provisions of said Act, I hereby certify that said Boeing Air Transport, Incorporated, of Seattle, Washington, shall have the right, so long as it complies with all rules, regulations, and orders that may be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting mail operation to advances in the art of flying and passenger transportation, to carry air mail over the route hereinafter set out or any modification thereof, at rates of compensation fixed herein, or to be fixed from time to time, at least annually, by the Postmaster General, provided that such rates shall not exce-d $1.25 per mile for a period ending not more than ten years from the date of beginning service under said contract, to-wit, on the Fifth day of April, 1936; subject to the following conditions:

Terms and Conditions

"1. The issuance of this certificate by the Postmaster General and its acceptance by the Carrier as hereinafter provided shall be deemed a full mutual release of the United States and the said Carrier from all the terms, conditions, and obligations of the air mail contract hereinbefore referred to, dated the twenty-ninth day of January, 1927, from the date of the acceptance of this certificate, except compensation due for services performed prior to the date hereof, and upon the acceptance thereof the said Carrier shall surrender the said contract to the United States.

"2. The route over which the Carrier shall have the right to carry air mail shall be from Chicago, Illinois, by Certain Designated Points, to San Francisco, California, and Return, including any extension or other modification of said route that may be made as hereinafter provided.

"3. Upon 60 days' notice to the Carrier, the Postmaster General from time to time may modify said route by an extension or extensions thereof, including lateral extensions or consolidations, and prescribe the schedule therefor in- [fol. 64] cluding the stops thereon, and determine the mileage upon which the compensation of the Carrier is to be based.

"4. For the purposes of this certificate the distance between the terminal points of the route hereinbefore prescribed shall be deemed to be 2,025 miles.

"5. The aircraft employed by the Carrier in the service authorized hereby shall be manufactured in the United States. They shall be of modern design, airworthy, and suitable for the service prescribed; the design and capacity of such aircraft, and the location, size and construction of the mail compartments therein, shall be subject to the approval of the Postmaster General.

"The following service may be prescribed by the Postmaster General:

A—Night Mail Service,
B—Night Mail and Passenger Service,
C—Day Mail Service,
D—Day Mail and Passenger Service.

"6. Until and including the 31st day of December, 1930, or until otherwise directed by the Postmaster General, the Carrier shall provide the following service over said route:

"1. One flight by a plane having not less than 125 cubic feet of space for 2,000 pounds of air mail, and accommodations for not less than eight passengers, departing from Chicago, Ill., at 8 a. m., daily except Monday, to be classified as Class D service, and payment made therefor at the rate of one dollar and eighteen and one-half cents ($1.18½) per mile, between Chicago, Ill., and Salt Lake City, Utah, until otherwise ordered.

"2. One flight by a plane having from 80 to 100 cubic feet of space for 1,600 pounds of air mail, departing from Chicago, Ill., at 8 p. m., daily, to be classified as Class A service, and payment made therefor at the rate of one dollar and eighteen cents ($1.18) per mile, between Chicago, Ill., and Salt Lake City, Utah, until otherwise ordered.

"3. One flight by a plane having from 80 to 100 cubic feet of space for 1,600 pounds of air mail, departing from Salt Lake City, Utah, eastbound, at 4 p. m., daily except Monday, to be classified as Class C service, and payment [fol. 65] made therefore at the rate of one dollar and three cents ($1.03) per mile, between Salt Lake City, Utah, and Chicago, Ill., until otherwise ordered.

"4. One flight by a plane having not less than 125 cubic feet of space of 2,000 pounds of air mail, and accommodations for not less than eight passengers, departing from Salt Lake City, Utah, eastbound, at 4 a. m., daily, to be classified as Class B service, and payment made therefor at the rate of one dollar and eighteen and one-half cents ($1.18½) per mile for day flying and one dollar and twenty-five cents ($1.25) per mile for night flying, between Salt Lake City, Utah, and Chicago, Ill., until otherwise ordered.

"5. One flight by a plane having from 80 to 100 cubic feet of space for 1600 pounds of air mail, and accommodations for not less than ten passengers, departing from Salt Lake City, Utah, westbound, at 9 p. m., daily except Monday, to be classified as Class B service, and payment made therefor at the rate of one dollar and twenty-five cents ($1.25) per mile for night flying and one dollar and sixteen cents ($1.16) per mile for day flying, between Salt Lake City, Utah, and San Francisco, Calif., until otherwise ordered.

"6. One flight by a plane having not less than 62.5 cubic feet of space for 1000 pounds of air mail, departing from Salt Lake City, Utah, westbound, at 9 a. m., daily to be classified as Class C service, and payment made therefor at the rate of ninety-five and one-half cents ($0.95½) per mile, between Salt Lake City, Utah, and San Francisco, Calif., until otherwise ordered.

"7. One flight by a plane having not less than 62.5 cubic feet of space for 1000 pounds of air mail, departing from San Francisco, Calif., at 8 a. m., daily except Monday, to be classified as Class C service, and payment made therefor at the rate of ninety-five and one-half cents ($0.95½) per mile, between San Francisco, Calif., and Salt Lake City, Utah, until otherwise ordered.

"8. One flight by a plane having from 80 to 100 cubic feet of space for 1600 pounds of air mail, and accommodations for not less than ten passengers, departing from San Francisco, Calif., at 8 p. m., daily, to be classified as Class B service, and payment made therefor at the rate of one dollar and twenty-five cents ($1.25) per mile for night flying and one [fol. 66] dollar and sixteen cents ($1.16) per mile for day flying, between San Francisco, Calif., and Salt Lake City, Utah, until otherwise ordered.

"7. Upon 60 days notice to the Carrier, the Postmaster General may increase, diminish, or modify the service above prescribed, and make such adjustments in the compensation of the Carrier as he may deem proper.

"8. The Carrier shall transport the mails of the United States offered for carriage over the route hereinbefore set out with due celerity, in a safe and secure manner, free from wet or other injury, receiving and delivering the same at fields and points therein designated on schedule prescribed by the Postmaster General.

"9. Payments shall be made to the Carrier monthly upon evidence that the service authorized hereby has been well and faithfully performed in accordance with the provisions hereof.

"10. The Carrier shall keep and maintain an accurate system of accounting in accordance with regulations pre-

scribed by the Postmaster General. These accounts shall include a record of all obligations, investments, expenditures, receipts and earnings from any source whatsoever, and shall be subject at all reasonable times to inspection and audit by the Post Office Department. The Carrier shall furnish to the Postmaster General such information regarding the accounts and operations as he may from time to time require.

"11. The Carrier shall not directly, or indirectly, promote the use of the air mail over the route hereinabove set out, or any other air mail route, except in accordance with regulations prescribed by the Postmaster General.

"12. This certificate is issued upon the express conditions that the said Carrier will hold itself subject to all the conditions imposed by the several Acts of Congress relating to the Air Mail Service and to all the provisions of the law relating to Post Offices and the Postal Service generally in so far as they are applicable to the Air Mail Service; that no Member of or Delegate to Congress shall be admitted to any share or part of the benefits accruing to it hereunder; and that it has not employed a third person to solicit or obtain the same, or to cause or procure the same to be obtained upon compensa-[fol. 67] tion in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for service in connection therewith, any brokerage, commission, or percentage, upon the amount receivable by it thereunder, and that it has not, in estimating the price at which it undertakes hereunder to carry the mail, included any sum by reason of any such brokerage, commission, or percentage, and that all money payable to it hereunder is free from obligation to any person for services rendered, or supposed to have been rendered, in the procurement of this certificate. And it is understood that a breach of this condition shall constitute adequate cause for the cancellation of this certificate by the Postmaster General, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

"13. The said Carrier shall be responsible for the persons to whom it commits the custody and transportation of

the mails, and the observance of the law by such persons and the faithful performance of the duties required by it of them; and shall not commit the custody or transportation of the mails to any person under sixteen years of age, nor to any person under sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction, nor to any person not authorized by law to be concerned in contracts for carrying the mail.

"14. The said Carrier shall be answerable in damages to the United States for any breach by it, or by its officers or agents, of the terms and conditions set out herein; and for such a breach, or for inferior service, or for loss of or damage to the mail through its fault or that of its officers or agents, the Postmaster General may make such deductions from the pay of the said Carrier as he may deem proper.

"15. The Carrier shall be required to provide necessary workroom space in its buildings on the field, or fields, to permit proper handling and distribution of mails by Post Office Department employees.

"16. This certificate may be cancelled by the Postmaster General at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made [fol. 68] for its guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be cancelled.

"17. By agreement of the Postmaster General and the Carrier, the life of this certificate may be curtailed, said certificate may be cancelled, or any other modification may be made herein not inconsistent with law.

"18. The Postmaster General shall have the right at any time during the period of service authorized hereby to require the Carrier to furnish surety other than that for which provision is hereafter made, and in his discretion to increase or reduce the amount of the bond that has been furnished by the Carrier.

"19. The delivery to and acceptance and approval by the Postmaster General of a bond in the sum of $251,000.00 conditioned upon the faithful and efficient performance in accordance with the terms and conditions hereinbefore set

out, of the service intended to be authorized by this certificate, duly executed by a surety acceptable to the Postmaster General; and the acceptance of this certificate upon the said terms and conditions, evidenced by the counter-signature of the said carrier, shall be conditions precedent to the vesting of any right in the said Carrier by virtue hereof.

Witness my hand and seal this 21st day of October, 1930.
(Sgd.) Walter F. Brown, Postmaster General.

Witness to signature of the Postmaster General:
——— ———. (Seal.)

Accepted upon the terms and conditions above set out this 29th day of October, 1930.
(Sgd.) Boeing Air Transport Inc., by James P. Murray. (Seal.)

Bond

(Corporate Surety)

Know All Men By These Presents, That Boeing Air Transport, Inc., Principal, and U. S. Fidelity & Guaranty [fol. 69] Co., as Sureties, are held and firmly bound unto the United States of America in the just and full sum of Two Hundred and Fifty-one Thousand ($251,000) lawful money of the United States, to be paid to the said United States of America or its duly appointed or authorized officer or officers to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, Boeing Air Transport, Inc., has executed a route certificate with the United States to carry the mail by aircraft on Route No. M 18, between Chicago, Ill., via certain designated points, and San Francisco, Calif., in accordance with the stipulations and agreements contained in said certificate.

"Now, The Condition of The Said Obligation Is Such, That if the said Boeing Air Transport, Inc., carrier, shall perform said service according to the certificate aforesaid,

then this obligation shall be void; otherwise to be in full force and obligation in law."

Witness then identified the contract made between the plaintiff and the City of Rock Springs. The same was introduced in evidence as Exhibit B. Said contract, including the contract between Rock Springs and the United States of America made a part thereof, and omitting signatures and parts merely formal, is as follows:

EXHIBIT B

"Lease

"This Indenture, made and entered into this 21 day of July, 1930, by and between The City of Rock Springs, a municipal corporation of the State of Wyoming, party of the first part, hereinafter called the lessor, and Boeing Air Transport, Inc., a corporation organized and existing under the laws of the State of Washington, party of the second part, hereinafter called the lessee,

"Witnesseth:

"That in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

[fol. 70] Airport Landing Field

Additional Ground and Privileges

"The lessor does hereby grant to the lessee, during the term of this agreement, the non-exclusive use of the municipal airport of The City of Rock Springs, Wyoming, as shown on the blueprint hereto attached and more particularly described as follows:

The N. ½, and the N. ½ of the S. ½ of Section Ten (10), Township Nineteen (19), North Range 105 West of the Sixth Principal Meridian, containing approximately 480 acres,

together with all improvements and equipment thereon, and in addition, leases a part or parcel of ground not smaller than 300′ x 150′ belonging to said airport, on a portion of which said lessee agrees to erect a building or hangar, for

any and all uses of said lessee, in the handling of its business on said airport. Said tract or parcel of ground to be located on the field at a place to be mutually agreed upon by and between the parties hereto.

"The lessee agrees to pay the lessor, the sum of Five Hundred Dollars ($500.00) a year, for the use of said airport and ground as described above upon which the building to be erected by the lessee will be located. Said yearly payments shall be payable at the beginning of each year of the term of this agreement. The first payment, under this agreement, shall become due on the 21st day of July, 1930.

"The lessor further agrees to lease, from time to time, unto said lessee, any and all additional land or lands, not already under lease, forming a part of said airport, that said lessee may need for the erection of a building, or buildings, thereon; said building or buildings to be used in connection with said lessee's business, and said lessee agrees to pay as rent, for said additional land or lands, so leased and used as above set forth, the sum of one cent (1c) per square foot per annum in advance.

"The lessor agrees to use all funds collected from lessee for ground or building rental for improvement and enlargement of landing field or facilities pertaining thereto.

[fol. 71] "The lessor further agrees that the lessee is to have the exclusive right and privilege of selling all gasoline and oils to all itinerant flyers using said airport, it being understood, however, that all persons using said airport in regular transcontinental service or in regular service from point to point, and under an agreement with the lessor, shall have the privilege of furnishing their own gasoline and oils to their own ships, if they so desire. It being further understood, that said exclusive privilege for the sale of gasoline and oils, shall be, considered as a lease privilege, and shall be in full force and effect during the pendency of this lease and agreement. The lessee agrees to have and maintain at said field men and equipment for the servicing and repairing of aircraft, but the lessee shall not be required to service or repair aircraft when such servicing or repairing calls for facilities that would not in the usual course be maintained on said airport under the existent circumstances. The lessor does hereby grant to the lessee the exclusive privilege of servicing and/or repairing aircraft on said airport at reasonable rates.

"The lessor agrees to cooperate with lessee in further grading and leveling of present field and to further enlarge the present field where possible. The lessor further agrees to keep said landing field, and the approaches to said landing field, clear of obstructions.

"The lessee agrees to supervise and manage said landing field for and on behalf of the lessor and under the direction of said lessor. The lessee further agrees to supervise and manage on behalf of the lessor and under the direction of the lessor the maintenance and upkeep of said landing field and the improvements and equipment thereon; said supervision and management to be without cost to the said lessor.

"It is agreed that the lessee may at its option and after giving the lessor 90 days' notice, terminate its obligation and duty to supervise and manage said landing field and airport and the maintenance and upkeep thereof. It is agreed that if the lessee shall terminate its obligation and duty to supervise and manage said landing field and airport, as aforesaid, that the annual rental to be paid by the lessee hereunder shall be increased not more than Thirty-six Hundred Dollars ($3,600.00) during entire term of lease.

[fol. 72] "The lessor shall bear all expense incident to the maintenance and upkeep of said airport and the improvements and equipment thereon except as otherwise herein specifically provided.

"The parties hereto agree each with the other to exert their best efforts to preserve the present airport intact and prevent the erection of improvements or obstructions thereon or nearby that will detract from the value of the field. It is further agreed that this agreement shall cover all additional real property acquired by the lessor for the purpose of adding to and/or enlarging or improving said airport.

Hangar and Office Building

"The lessor does hereby grant to the lessee during the term of this agreement the exclusive use of the hangar and office building now on said airport. The lessee shall have the privilege of renting space in said building at reasonable rates and said rentals shall become the property of the lessee.

"The lessee agrees to use reasonable efforts to keep said present hangar and office building in a reasonable state of repair during the term of this agreement, provided, however, that if said building should become obsolete or generally decayed or unsound, the lessee shall be relieved of its obligation to repair said building. The lessee agrees to keep said hangar and office building insured for and on behalf of the lessor, at eighty per cent (80%) of its then value, and to pay the premiums of said insurance.

Future Buildings and Improvements

"The lessor may enter into agreements with third persons, which provide for the privilege of using said air field and for the construction of buildings or other improvements, for the use of said third persons, on or adjacent to said airport, provided, however, no buildings shall be erected or improvements made which will detract from the value of said airport and/or interfere with the use or enjoyment of said airport by the lessee.

Lighting

"The lessor agrees to improve and extend the present landing field lighting system, should it later become neces- [fol. 73] sary, so as to include and cover all of said landing field, and to provide all necessary extensions due to field changes, and the lessee agrees at the option of the lessor, to install said extended and improved lighting system, so that the same meets with the approval of the Department of Commerce of the United States, at the cost and expense of said lessee and the lessor agrees with said lessee, to reimburse said lessee by permitting said lessee to deduct said expenses and costs from the rents due or to become due.

"The lessee agrees to operate all lighting equipment now used in lighting said landing field at its own expense and without cost to the lessor, including electric current; said operation to be for the benefit of all planes that may travel the airways at night. The lessee also agrees to keep all such lighting equipment in good, serviceable condition at its own expense. The lessee further agrees to operate and maintain at its own expense all additional lighting equipment placed upon said airport with the consent of the lessor.

Water

"The lessor agrees to run a 2" water line from the most adjacent point on the present Green River water supply system supplying the City of Rock Springs and Reliance to a point designated by lessee adjacent to said proposed buildings at the cost and expense of said lessee, to reimburse said lessee by permitting said lessee to deduct said expenses and costs from the rents due or to become due, at an amount of Two Hundred Dollars ($200.00) per annum. Lessee agrees to pay all regular water charges for water used by them. It being agreed by the lessor that said water supply system will be completed within fifteen (15) days after the date of signing the lease in order to permit lessee to start building construction.

Regular Users

"The lessor may make agreements with regular users of said landing field covering the use of said landing field by said regular users, provided, however, that said agreements shall in no wise infringe upon rights and/or privileges herein granted to the lessee.

"The lessee may charge regular users of said airport reasonable rates for the use of the field lighting equip-
[fol. 74] ment, and/or other improvements constructed and/or maintained by the lessee.

Itinerant Flyers

"No charge shall be assessed by the lessee against itinerant flyers for the use of lighting equipment and/or other improvements constructed and/or maintained on said landing field at the expense of the lessee. By 'Itinerant flyer' is meant a non-commercial flyer who is not a regular user of the airport and uses it on infrequent occasions.

Radio

"The lessee is hereby given the privilege of installing in the present hangar or new buildings any radio equipment it may desire, or of building a radio plant to be used in connection with the lessee's business at said field.

Liability

"The lessee agrees to hold the lessor harmless of and from any and all liability arising from injuries to persons or damage to property caused by aircraft of the lessee or otherwise caused by the lessee when acting in the capacity of a user of said airport.

"The lessor agrees to hold the lessee harmless of and from any and all liability incurred by the lessee by reason of the supervision and management of said airport by the lessee for and in behalf of the lessor.

"The lessor agrees to secure agreements from all regular users of the airport releasing the lessor and the lessee from all liability arising from injuries to the persons or property of said users and indemnifying the lessor and lessee against all liability arising from injuries to persons or property caused by said users while using said airport.

Policing of Field

"In the event of the existence of unusual conditions the lessor agrees to request necessary policing for said airport from County upon request by the lessee.

Lessor to Prescribe and Enforce Rules and Regulations

"The lessor agrees to adopt and to enforce rules and regulations governing the proper use of said airport and [fol. 75] its facilities. The lessor agrees that said rules and regulations shall give the right of way to inbound or outbound transport and mail planes and that said rules and regulations shall not conflict with the rules and regulations of the Department of Commerce of the United States Government.

Additional Charges

"The lessor agrees that it will impose no charge of any kind or character upon materials and/or products purchased or otherwise acquired by the lessee for use on said airport, nor shall a charge be imposed by said lessor upon materials and/or products prior to their acquisition by the said lessee.

"The lessor agrees that all other companies affiliated with the lessee may use said airport under the terms and

conditions herein provided and that no rents or charges need be paid by said affiliated companies for said use.

Removal or Disposal of Improvements

"All buildings erected by the lessee on said airport and all equipment heretofore and/or hereafter installed on said airport by the lessee, and all field equipment furnished by the lessee at its expense, shall remain the property of the lessee, and upon the termination of this agreement, may be removed from said airport by said lessee or otherwise disposed of within six months after the termination of this agreement.

Termination of Existing Agreement

"That certain contract dated April 5, 1927, between the parties hereto and relating to the use and occupation of the City of Rock Springs airport is hereby terminated. The rights of the parties hereto prior to the date hereof shall be determined by the provisions of said contract of April 5, 1927, and the rights of the parties hereto shall be hereafter defined by the terms of the herein agreement.

Equality of Users

"The lessor agrees that it will not, during the existence of this lease, permit any other person any use of all or any portion of said airport on terms more favorable than those herein provided for the lessee.

"It is agreed that the term of this lease and agreement [fol. 76] shall be for a period equal to the period granted by the United States Department of Interior to the City of Rock Springs for said airport, copy of which is attached. An option to the lessee by the lessor to renew said lease is granted, providing the City of Rock Springs is successful in renewing its lease for said airport with the United States Department of Interior; it being understood that the period of lease be equal to the period granted in the new lease by the United States Department of Interior to City of Rock Springs. Rental charges shall be adjusted by and between the lessor and the lessee for the purpose of establishing the amount of the rents to be charged and paid for the new period ensuing. In the event said lessor and said lessee

cannot agree, then and in that event said matter shall be decided by a Board of Arbitration consisting of three (3) members chosen in the following manner: The lessor shall select one (1) member, the lessee shall select one (1) member, and the two (2) members, so selected, shall select a third member. Said arbitrators shall meet within a reasonable time and without delay and promulgate such rules as they deem necessary for their procedure, and shall make findings as to the amount of rent to be charged and paid for the next period ensuing for all of the privileges and property leased herein or hereafter leased in accordance with the terms of this agreement, and their findings shall be binding upon the parties hereto and the amount established by said arbitrators shall be the amount charged and paid as rent for the next ensuing period.

"It is agreed that upon the termination of the carriage of United States Air Mail by the lessee, the lessee shall have the right at its option to terminate this agreement upon first giving to the lessor six (6) months' notice, in writing, of its intention so to do.

"It is further agreed that if the United States Government should eliminate the City of Rock Springs as a stopping point upon the air mail route covered by the lessee, the lessee may at its option terminate this agreement upon first giving to the lessor 90 days' notice, in writing, of its intention so to do.

"It is agreed that in the event of a breach of any of the covenants of the lessee herein contained the lessor may serve notice, in writing, that if said breach is not cured [fol. 77] within 60 days after the service of said notice this said agreement shall be terminated. If said breach has not been cured within said 60 day period the lessor may declare this lease and agreement at an end, and of no force and effect, and said lessor may recover possession of said airport privileges and leaseholds, as if held by forcible detainer, and said lessee hereby waives notice or demand for the possession of the same and agrees to vacate the premises, provided that lessee may nevertheless remove buildings and personal property from said airport as heretofore set forth.

"The lessor agrees that the lessee may assign this lease, provided, however, that upon the assignment thereof the lessor may terminate that portion of this agreement which

provides that the lessee shall supervise and manage said airport, and the assignee of said lease shall thereupon assume the management of said field or pay an additional rental of Thirty-six Hundred Dollars ($3,600.00) per annum.

"It is further agreed by the parties hereto that the terms of this lease are all subject to the terms, covenants and agreements contained in that certain lease granted to the lessor herein by the United States of America, by and through the Department of the Interior, a copy of which last said lease shall be recorded in the office of the County Clerk and Ex-Officio Register of Deeds of Sweetwater County.

"And the City of Rock Springs hereby agrees to do and perform each and every act binding upon the City of Rock Springs by said last named lease, and upon the failure of the City of Rock Springs to perform said obligations contained in said last named lease, or any of them, then and in that case, the lessee herein shall have the right, for and in behalf of the City of Rock Springs, of performing all such obligations, as fully, and with the same force and effect, as though the lessor, the City of Rock Springs, had performed those things incumbent therein upon it to perform.

"It is further agreed by and between the parties hereto that the conditions, covenants and agreements herein contained to be performed by the lessee are to be construed as conditions subsequent in contract, and which it shall be incumbent upon the lessee to do and perform, according to the letter and spirit thereof."

[fol. 78] "4-455 (March, 1930)

United States Department of the Interior, General Land Office

Lease of Lands for Use as a Public Airport

Act May 24, 1928, Public No. 499

(To be executed in quadruplicate)

Evanston 016842. Serial No. "K" MKH

"This Indenture of lease entered into this — day of ——, 19—, by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by the Assistant Secretary of the Interior,

and the City of Rock Springs, a municipal corporation, of the County of Sweetwater, State of Wyoming, party of the second part, hereinafter called the lessee, under, pursuant, and subject to the terms and conditions of the act of Congress of May 24, 1928 (Public No. 499), entitled 'An Act to authorize the leasing of public lands for use as public aviation fields,' and the regulations thereunder:

"Witnesseth:

"Section 1. That the lessor, in consideration of rents to be paid and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege of maintaining an airport on the following described tract of land, to-wit: The N. ½, and the N. ½ of the S. ½ of Section Ten (10), Township Nineteen (19), North Range 105 West Sixth P. M. containing approximately 480 acres, together with the right to construct and maintain thereon all buildings or other improvements necessary as an airport for the accommodation of the public for a period of 20 years and if at the end of said period the Secretary of the Interior shall determine that a new lease should be granted, the lessee herein will be accorded a preference right thereto upon such terms and for such duration as may be fixed by the lessor.

"Section 2. For and in consideration of the foregoing, the lessee hereby agrees:

[fol. 79] "(a) To establish a public airport on said tract and to maintain same during the life of this lease.

"(b) To pay the lessor a yearly rental of ten dollars.

"(c) To complete the construction of facilities for service, fuel and other supplies necessary to make the land available for public use as an airport within six months from the execution of this lease.

"(d) That he will at all times keep the airport equipped and maintained in accordance with the ratings set by the Department of Commerce.

"(e) That all departments and agencies of the Government operating aircraft shall have free and unrestricted use of the airport and with the approval of the lessor shall have the right to erect and install thereon such structures

and improvements as the heads of such departments and agencies deem advisable including facilities for maintaining supplies of fuel, oil, and other materials for operating aircraft.

"(f) That whenever the President may deem it necessary for military purposes, the Secretary of War may assume full control of the airport.

"(g) Not to allow the use of the premises included in this lease for unlawful purposes, or for any purpose not in harmony with the proper use as an airport.

"(h) That authorized representatives of the lessor or of the Department of Commerce shall at any time have the right to enter the leases premises for the purpose of inspection and shall have free access to the books containing records of operations under authority of this lease.

"(i) Not to assign this lease without the consent of the Secretary of the Interior first had and obtained.

"Section 3. It is further understood and agreed that rates and prices for accommodation and service may be fixed by the Secretary of the Interior whenever it is deemed necessary.

"(a) That if the lessee shall fail to use the premises or any part thereof, or shall use it or any part thereof foreign to the proper use, or shall fail to pay the annual rental or any part thereof, or shall fail to comply with the provisions of this lease or shall fail to maintain the premises [fol. 80] according to the ratings set by the Department of Commerce, the lessor may, in his discretion, terminate and cancel this lease.

"(b) That upon the termination of this lease by expiration or forfeiture thereof, or whenever the United States may claim the right of possession as herein provided, the lessee agrees to surrender possession of the premises to the United States and to comply with such provisions and conditions respecting the removal of the improvements and equipment on the property as may be made by the Secretary of the Interior."

The witness then identified the contract between the plaintiff and the City of Cheyenne, which was then intro-

duced in evidence as Exhibit C. The said agreement with the City, omitting the testamonium clause and signatures and acknowledgments, is as follows:

EXHIBIT C

"Agreement

"This Agreement, Made in duplicate this first day of July, A. D. 1929, by and between the City of Cheyenne, a municipal corporation located and existing in the County of Laramie and State of Wyoming, hereinafter called the 'City,' party of the first part, and Boeing Air Transport, Inc., a private corporation organized and existing under and by virtue of the laws of the State of Washington and authorized to transact business within the State of Wyoming, hereinafter called 'Boeing Company,' party of the second part,

"Witnesseth:

"That whereas, the City is the owner of a municipal airplane field located within the corporate limits of Cheyenne, which it desires and intends to develop in an effort to establish Cheyenne as a center of airplane traffic; and,

"Whereas, the Boeing Company now operates an airplane line extending from Chicago, in the State of Illinois, to San Francisco, in the State of California, passing through Cheyenne, which transports passengers, mail and express, and hopes to continue such operations; and,

"Whereas, the Boeing Company believes that the provisions hereof make it advantageous for it to center the operations of said Chicago-Francisco line at Cheyenne as [fol. 81] herein set forth, and the City believes that inducing the Boeing Company to so center its operations will aid in the development of said field as an aviation center, and that such development would tend to materially increase the prosperity of Cheyenne,

"Now, Therefore, in consideration of the premises and the mutual covenants and agreements herein made and of the benefits and advantages which will be obtained by each of the parties hereby it is agreed as follows:

"1. That said municipal airplane field is located in the northeast portion of Cheyenne, and that its exact location,

boundaries, etc., are shown by the map 'Exhibit A' which is hereto attached and hereby made a part hereof.

"2. That said municipal airplane field is at the date hereof bounded and surrounded by a line of field lights, which are shown on 'Exhibit A' and that said field shall be immediately enlarged to include all of the area indicated on 'Exhibit A' as included within the red line, and that the words 'municipal field' where hereinafter used shall mean and denote said enlarged field and all of the portion within said red line. That the parties immediately after the ensealing hereof shall proceed to grade and prepare all of the new area to be included in said municipal field, and as soon as said new area has been properly graded and prepared shall install a new lighting system marking the boundary of said municipal field. The cost of all of the work of preparing and grading the new area and the cost of the new lighting equipment and the installation thereof shall be divided equally between the parties, the total cost not to exceed Seven Thousand Dollars ($7,000.00).

"3. The City agrees to use all reasonable efforts to acquire at its own expense the land included within the area which is indicated on 'Exhibit A' by the No. 12, and after acquiring the same and during the entire period in which the Boeing Company shall make any use of said municipal field under the provisions hereof that it will keep all of said area, or as much thereof as it may acquire, free from all buildings and/or obstructions.

"4. That those areas indicated on 'Exhibit A' by the numbers 11 and 14 are now owned by the City, and that the City shall retain title to the same during the entire period in [fol. 82] which the Boeing Company shall make any use of said municipal field under the provisions hereof, and during all of said period the City will keep all of each of said areas free from all buildings and/or obstructions.

"5. That the City will permit the United States Weather Bureau to use and occupy that building located on the municipal field as shown by Number 7 on 'Exhibit A' and known as the Weather Bureau Building, on such terms as

may be mutually agreeable to the City and the Weather Bureau during the entire term hereof.

"6. That that certain building known as the Administration Building and located on the said municipal field as indicated by Number 6 on 'Exhibit A' shall be used as an administration building during the entire term hereof under the direction of the City, and that the Boeing Company may for the considerations herein mentioned, use and occupy that portion of said building which it now uses and occupies during the period it shall manage the field.

"7. The City agrees that that certain space and area on the westerly boundary of said municipal field indicated on 'Exhibit A' by the number 15 shall be kept free and open during the entire term hereof as a taxi-way and as an approach and exit for planes landing on said field or taking off therefrom.

"8. That the City has leased and let and does hereby lease and let to the Boeing Company for the term of twenty-five (25) years from the date hereof the four hangars and the control house belonging to the City located on said field, the exact location being shown on 'Exhibit A' by the numbers 1, 2, 3 and 4, and by the letter C. The Boeing Company agrees to pay as rental for the buildings leased to it by this paragraph the sum of Three Thousand Dollars ($3,000.00) per year, the said rental to be first paid one year from the date hereof, that is to say, on July 1, 1930, and to be payable on July 1st in each and every year thereafter during the continuance hereof. The Boeing Company shall also during all of said term at its own expense keep the said hangars insured at eighty per cent of their value in the name of the City and in reasonable repair.

"9. The Boeing Company agrees during the entire period of its lease of said City hangars, to provide reasonable me- [fol. 83] chanical service to visiting airplanes and to furnish visiting airplanes with supplies at prices not exceeding those charged at other fields similarly located, the Boeing Company, however, shall not be obliged to provide either mechanical service or supplies at a price less than the cost thereof. The Boeing Company also agrees to furnish hangar space at reasonable prices to visiting airplanes when it shall have such hangar space available.

"10. That the City has leased and let and does hereby lease and let to the Boeing Company for the term of twenty-five (25) years from the date hereof that rectangular tract of land located easterly from the said hangars, and shown on 'Exhibit A' by the number 8, and more particularly hereinafter described as a site on which it may construct hangars and/or buildings useful to it in connection with its airplane operations. The said rectangular tract of land referred to in this paragraph as 'hangar space' is two hundred (200) feet in depth measured in an easterly and westerly direction and seven hundred (700) feet in width measured in a northerly and southerly direction. The metes and bounds description of said hangar space is as follows:

"Beginning at a point 490.5 feet west and 117.2 feet north of the center of Section 30, T. 14 N., R. 66 W., of the 6th P. M., thence west on first course, parallel to the north and south center line of said section 30, 200 feet, thence north on second course, and at right angles to the aforesaid line, 700 feet, thence east on third course, parallel to the center line of Section 30, 200 feet, thence south, parallel to second course, 700 feet to point of beginning.

"The Boeing Company agrees to begin within ninety (90) days from the date hereof the construction of a hangar on said hangar space to cost not less than Fifty Thousand Dollars ($50,000.00). The said hangar shall have masonry walls, with steel frames.

"The City also leases to the said Boeing Company as taxi-ways for said hangar space and for the four hangars leased to the Boeing Company by paragraph numbered 8 herein, all of that space marked 'Taxi-way' east of the said hangar space number '8' and all of the space between said hangar space number '8' and the said hangars leased to the Boeing Company by said paragraph number '8'. The City [fol. 84] also leases to the Boeing Company the easterly half of the space between hangar space number '8' and the space numbered '5' already leased by the City. The Boeing Company shall maintain, repair, and, if necessary for the use of the Boeing Company, improve the said taxi-ways herein leased to it, and at its own expense shall furnish such light therein as may be necessary for its own uses.

"The Boeing Company shall pay Ten Hundred and Fifty Dollars ($1050.00) as annual rental for said hangar space

and taxi-ways, the first payment to be due one year after the date hereof, to-wit, on July 1, 1930, and except as hereinafter limited the Boeing Company shall pay said annual rental on July 1st of each and every year thereafter during the period it shall occupy any portion of said hangar space as a tenant of the City. Should the Boeing Company fail to begin the construction of a second building on said hangar space within five (5) years from the date hereof, then and in that event the lease shall terminate as to the northerly third of said hangar space, but remain in full force and effect as to the southerly two-thirds thereof.

"Should the Boeing Company fail within ten (10) years from the date hereof to begin the construction of two buildings additional to the said hangar to be begun within ninety days the lease shall terminate as to each third of said hangar space (the said thirds to be measured in a northerly and southerly direction) which does not contain a building of the Boeing Company but shall remain in full force and effect as to the balance of said hangar space. In the event of the termination of the lease as to any portion of the hangar space the annual rental shall be proportionately reduced. The Boeing Company agrees that airplanes properly using the municipal field may taxi across any one of the said thirds of the said hangar space prior to the construction of a building thereon by the Boeing Company. On the final termination of the lease of any of the said thirds of said hangar space which contains a building or buildings constructed by the Boeing Company the City will either extend the period of the lease to said third or thirds containing a building of the Boeing Company for an additional period of fifteen (15) years upon the terms herein provided or it will cause such building or buildings to be purchased from the Boeing Company at their then value. [fol. 85] The said value shall be determined by three appraisers. Each of the parties shall appoint one of said appraisers and the two so appointed shall choose the third appraiser.

"11. The City agrees that that certain area shown on 'Exhibit A' by the number 10 shall be kept and maintained by the City as a site for additional hangars, the hangars erected thereon to be erected under regulations prescribed by the City but in no case to exceed twenty-five (25) feet in height over all.

"12. That there are now located on the municipal field four hangars owned by the City, indicated on 'Exhibit A' by the numbers 1, 2, 3 and 4, and an additional hangar within that general area indicated on 'Exhibit A' by the number '5', and that said area number '5' is now under lease by the City, and that there is now located on the municipal field an administration building, indicated on 'Exhibit A' by the number 6, and that there is a weather bureau building on the municipal field indicated on 'Exhibit A' by the number 7, and a control house indicated on 'Exhibit A' by the Letter 'C', and that said 'Exhibit A' also indicates a hangar space marked number 8, which is herein leased to the Boeing Company, and that an additional space set apart for hangars is indicated on 'Exhibit A' by the number 9. The City agrees that no additional or further obstructions will be permitted on the municipal field during the term hereof except those already thereon as in this paragraph indicated and except those which may be erected on the area number 5 now under lease by the City and on the area number 8 herein leased to the Boeing Company, and on the area number 9 reserved for future hangars. The City agrees that all buildings to be constructed on the said municipal field or adjacent thereto on property owned by the said City shall have masonry walls with steel frames, and that such spaces will be provided between buildings as may be necessary for reasonable fire protection. The City agrees that all spaces indicated on 'Exhibit A' as taxi-ways shall be kept free and open for the use of persons (including the Boeing Company) having buildings served by such taxi-ways. The portion of said municipal field remaining after excluding therefrom that portion covered by the buildings and by the hangar spaces in this paragraph above specifically described, and the taxi-ways, indicated on 'Exhibt A', is hereinafter referred to as 'landing field.' The Boeing Company shall have full [fol. 86] but not exclusive use of the said landing field.

"13. The City agrees to keep the said landing field during the term of this agreement and during the entire period in which the Boeing Company shall occcupy any portion of said municipal field as a tenant of the City as a suitable, well maintained and well regulated airplane landing field for the reasonable use of any and all planes and/or air

ships operated by the Boeing Company. While the City does not agree that the planes of the Boeing Company shall have any greater or better right to make use of the landing field than it grants other users, yet the City agrees that the Boeing Company shall have rights on the landing field and on the municipal field fully equal to that granted to any other user. The City also agrees that during the entire term hereof it will prescribe and enforce on said landing field, and municipal field reasonable and efficient regulations governing the use thereof, and the City agrees that such regulations shall give the right of way to inbound or outbound transport and mail planes, provided that such regulations shall not conflict with the Department of Commerce regulations.

"14. The City agrees that the Boeing Company shall be entitled to the full use of said municipal field and landing field during the term hereof on terms as favorable as may be granted by the City to any other user thereof, and that no charge shall be exacted from the Boeing Company for any use which it may make thereof additional to that herein specifically provided.

"15. The Boeing Company shall superintend, manage and operate the said municipal field and landing field for and on behalf of the City and under its direction, throughout the period during which it shall hold a contract with the United States of America to carry mail through Cheyenne on the transcontinental route. The term and period of said management shall not exceed twelve (12) years from the date hereof. The Boeing Company shall during the period of such management keep and maintain at said municipal field continuously throughout the entire twenty-four hours of each and every day an officer to superintend and direct the management of said municipal field and landing field and caretakers to assist in such management and direction. The Boeing Company under the City's direction shall superintend the maintenance and upkeep of the municipal [fol. 87] field and landing field and its equipment, including the lighting equipment and, under the City's direction shall superintend and direct the traffic on the landing field, and operate the lighting equipment. The Boeing Company shall under the City's direction perform all of the actual work of maintaining the municipal field, including the

grading, dragging, conditioning and leveling of the landing field, and the maintenance and repair of the lighting equipment. The City shall pay to the Boeing Company for the services thus rendered to the City the actual cost thereof to the Boeing Company, excluding all charges for superintendence, directing the municipal field and traffic thereon, accounting, office expense and time of officers and excluding all charges for operating the lighting equipment and directing the maintenance and upkeep of the municipal field and/or the lighting equipment. Electric current, labor, materials and supplies shall be charged to the City at the actual price paid therefor by the Boeing Company. The Boeing Company, however, shall at its own expense equip and light its own and leased buildings and its taxiways. The Boeing Company shall receive in full for all services performed by it in superintending the municipal field and landing field and in directing traffic thereon and in providing supervising officers and caretakers and in full for all office expense and time of officers and accounting, and in full for operating the lighting equipment, and in full for directing the maintenance and upkeep of the municipal field, the sum of Twenty-four Hundred Dollars ($2,400.00) per year, payable annually on July 1st of each year, the first payment to be due on July 1st, 1930.

"16. Beginning on July 1st, 1930, and beginning annually on the same day of each following year during the continuance hereof the parties shall audit and balance their accounts and payments shall be made in accordance with such balances. During said audit each of the parties and/or their representatives shall have full access to the books and accounts of the other party relating to the matters covered by the audit.

"17. The City agrees that it will not during the continuance hereof permit any person other than the said Boeing Company any use of any portion of said municipal field on terms more favorable than the terms herein stipulated for said Boeing Company.

"18. The City agrees at the request of the Boeing Com- [fol. 88] pany to detail such policemen in uniform for duty on the field as may be necessary to assist in enforcing the City regulations governing the use of the field.

"19. Neither said City nor said Boeing Company shall be liable for any loss, damage or injury occurring in or on said municipal field, except such as shall be caused by its own officers, agents and/or employees. And the said City shall hold the said Boeing Company harmless of and from any and all loss and damage through any and all injuries to person or property caused by the officers, agents and/or employees of said City, and the said Boeing Company shall hold the said City harmless of and from any and all loss and damage through any and all injuries to persons or property caused by the officers, agents, and/or employees of said Boeing Company.

"20. The City agrees that it will impose no charge of any kind or character upon materials and/or products purchased or otherwise acquired by the Boeing Company for use on the premises herein leased, nor shall a charge be imposed by said City upon materials and/or products prior to their acquisition by the Boeing Company.

"21. It is agreed that the companies affiliated with the Boeing Company may use the premises herein leased under the terms and conditions herein provided and that no rents or charges need be paid by said affiliated companies for said use.

"22. The Boeing Company agrees that it will, so long as the same shall in its opinion be practicable, make Cheyenne the operating center of its Chicago-San Francisco line, establish at Cheyenne its general shops for the repair and overhauling of planes used by it on said line and centralize at Cheyenne the repairs, overhauling and rebuilding of the airplanes used on said Chicago-San Francisco line and/or the motors of said planes. The Boeing Company further agrees that it will, so long as the same shall in its opinion be practicable, establish at Cheyenne the operating headquarters, the traffic headquarters and the supply depot for such line and make Cheyenne the principal maintenance point of said line.

"23. That that certain contract dated July 1, 1927, between the parties hereto and relating to the use and occupation of the Cheyenne municipal airplane field, by the [fol. 89] Boeing Company which leased the hangars located thereon to said Boeing Company, be and the same is hereby

terminated and ended and that the rights of the said parties prior to the date hereof shall be determined by the provisions of said contract of July 1, 1927, and that the rights of the parties shall be hereafter defined by the terms of this instrument.

"24. That the term of this agreement shall extend for the period of twenty-five (25) years from and after the date hereof.

"25. The Boeing Company shall not assign this instrument or any part or portion thereof, nor shall it sublease or sublet any portion or part of the premises herein leased to it without the written consent of the City first had and obtained."

The Witness continuing:

I have general supervision over the operations of the plaintiff from Chicago to San Francisco. I have general supervision over the maintenance of the field at Cheyenne, as well as all the other fields on our line.

Plaintiff is engaged in the business of carrying mail, express and passengers for hire between Chicago and San Francisco and intends to continue in that business. This business is carried on by the use of airplanes travelling through the air. The fuel used in propelling these airplanes is gasoline. We know of no other fuel that could be used. A mail compartment is provided in each plane in which all of the mail is carried. The mail to Rock Springs is carried in the same compartment with the other mail. The gasoline used in carrying the interstate mail could not be separated from that used in carrying the intrastate mail. Each plane carries about 2,000 times as much interstate mail as it carries mail from Cheyenne to Rock Springs. In that statement I include all of the mail carried from Cheyenne to Rock Springs, both interstate and intrastate mail. I do that because I do not have knowledge of the amount of that Rock Springs mail that is interstate.

We operate on regular schedules over regular routes and could not get business otherwise, especially with the mail contracts.

I personally made, under protest, payments to Mr. Edel-
[fol. 90] man while he continued as State Treasurer, on behalf of the plaintiff, on gasoline used in interstate commerce, as follows:

On that put into the tanks at Cheyenne:

April 12, 1930	455 96
May 10, 1930	651 68
August 13, 1930	698 40
September 11, 1930	724 48
October 13, 1930	668 92
November 15, 1930	689 88
December 13, 1930	661 80

On that put into the tanks at Rock Springs:

April 12, 1930	240 28
May 10, 1930	256 32
August 13, 1930	322 32
September 11, 1930	363 04
October 13, 1930	355 60
November 15, 1930	418 72
December 13, 1930	386 20

I personally made payments to Mr. Edelman while he continued as State Treasurer, on behalf of the plaintiff, of four cents per gallon on gasoline used otherwise than in interstate commerce, as follows:

On gasoline sold and/or used at Cheyenne:

April 12, 1930	$189 52
May 10, 1930	150 08
August 13, 1930	98 88
Sept. 11, 1930	204 00
Oct. 13, 1930	381 88
Nov. 15, 1930	310 88

On gasoline sold and/or used at Rock Springs:

April 12, 1930	$17 52
May 10, 1930	25 24
August 13, 1930	41 16
Sept. 11, 1930	73 56
Oct. 13, 1930	70 84
Nov. 15, 1930	28 44

When we paid the taxes on the gasoline used in interstate commerce, we made the payments to avoid the severe pen- [fol. 91] alty imposed by the statute of Wyoming if they were not made, and we filed a protest with every such payment. For example, with the payment made October, 1930, we filed a paper in the following words:

EXHIBIT D

Boeing Air Transport, Inc.

Remittance Advice

Paid to Treasurer of the State of Wyoming. Date 10/9/30

Description	Item	Deduction	Amount
Alleged Gasoline Tax	.....	.....	$355.60

Monthly Statement of the Number of Gallons of Gasoline Used Exclusively in Interstate Commerce

By Boeing Air Transport, Inc. (From the Rock Springs Air Field, within and outside the State of Wyoming during the calendar month ending September 30, 1930, rendered to the Treasurer of the State of Wyoming pursuant to the provisions of Chapter 73, Session Laws of Wyoming, 1923.

Date	Tank car No.	Shipped from	Shipped to consignee and destination	Gallons sold	Amount of tax
.....	.....	.....	.....	.....	.....

The Boeing Air Transport, Inc., during the calendar month of September, 1930, used exclusively in interstate commerce in planes flying from the Rock Springs Air Field a total of 8,890 gallons of gasoline on which no gasoline tax had previously been paid to the State of Wyoming. A tax of four cents a gallon on such gasoline would amount to 355.60.

Each and every portion of said gasoline was used solely in propelling the airplanes of the Boeing Air Transport, Inc., in interstate commerce. A portion of such gasoline was used inside the State of Wyoming and a portion outside the State of Wyoming.

STATE OF WYOMING,
County of Laramie, ss:

I, D. B. Colyer, being first duly sworn, depose and say upon oath that I am Vice-President in charge of operations [fol. 92] of the Boeing Air Transport, Inc., a user of gasoline in the State of Wyoming; that the foregoing statement is a full, true and correct statement of the number of gallons of gasoline used in interstate commerce during the calendar month ending September 30, 1930, by said Company from the Rock Springs Air Field.

(Sgd.) D. B. Colyer.

Subscribed and sworn to before me this 9th day of October, 1930. My commission expires Aug. 28, 1933. (Sgd.) Fred Harcleroad, Notary Public. (Seal.)

The Boeing Air Transport, Inc., is herewith handing to you Three Hundred and Fifty-five Dollars and Sixty Cents ($355.60) claimed by you as taxes on 8,890 gallons of gasoline which was used by said company in flying its interstate planes during the month of September, 1930.

All of the said gasoline was placed by said Company in planes engaged in interstate commerce while the planes were at the Rock Springs Air Field within the State of Wyoming and was used by said planes solely in interstate commerce.

The said Company protests this payment and insists that the said taxes are not, nor are any of them due from or payable by it, for that all of the said gasoline was used in interstate commerce and none of it used for any intrastate purpose or otherwise than as above stated. The said Company protests that it makes the said payment solely to avoid the heavy civil penalties and the heavy criminal penalties denounced against it and its officers and servants in case of failure to make such payment and only under the duress of such heavy liabilities and such penalties. It further gives notice of its intention to bring its action for recovering back each and every amount so paid upon the ground that the said tax and every part thereof is an illegal exaction from said Company in violation of Article 1, Section 8 of the Constitution of the United States, being a direct burden on interstate commerce, and upon the further

ground that a portion of said gasoline was actually consumed outside of the State of Wyoming.

Cheyenne, Wyoming, October 1, 1930.

Boeing Air Transport, Inc., by (Sgd.) D. B. Colyer.

[fol. 93] Receipt is acknowledged of a copy of the foregoing protest and of the amount of money specified therein as paid under protest, and also a copy of the monthly statement or return accompanying said protest, said statement showing the amount of gasoline alleged by the Boeing Air Transport, Inc., to have been used by it in interstate commerce from the Rock Springs Air Feld, this 13 day of October, A. D. 1930.

(Sgd.) W. H. Edelman, State Treasurer.

(And the defendants, and each of them, by their counsel now in open court admit that protests in similar form were made with each payment by or on behalf of plaintiff of taxes on gasoline claimed to be used in interstate commerce.)

Witness continuing:

The gasoline not used in interstate commerce was used in the operation of our motor trucks and on our test stand for running in of engines, on local flights of the airplanes, and for test flights, and for washing down engine parts and planes, and so on.

The other payments that we made without protest cover all of the gasoline used otherwise than in airplanes in interstate commerce.

The plaintiff has property at Cheyenne and has paid all of the taxes on that property each time the taxes were due. The same things are true at Rock Springs. We owe nothing for taxes on property in Wyoming.

The air field at Rock Springs is not within the limits of the City. It is some three miles from the City limits. The tax rate there averaged 1.22% on the assessed valuation during this period.

I paid to Mr. Weston after he became Treasurer, under similar protests and to avoid the penalties as I have indicated, the following amounts as the four cents per gallon taxes on the gasoline used in interstate commerce:

On That Used from the Cheyenne Air Field

January 9, 1931	$ 762.68
March 9, 1931	707.28
May 12, 1931	1,002.44

[fol. 94] On that used from the Rock Springs Air Field:

January 9, 1931	$488.48
March 9, 1931	507.20
May 12, 1931	550.32

The gasoline used in this interstate commerce was of an average value from February 1, 1930, to June 1, 1931, of less than 13 cents per gallon. The four cents per gallon paid by plaintiff was between 30 and 33⅓ per cent of the value of all the gasoline used. We did not own all of that gasoline on April 1st but purchased it during the entire period; probably had on hand on April 1st between 5,000 and 10,000 gallons. We paid the four cents per gallon on 375,000 gallons of gasoline used in the interstate commerce. We purchased the gasoline.

The plaintiff pays the administration charges and the maintenance charges on the field at Rock Springs. We stand all of the expenses other than any that the City assumes itself. The City assumes none that I know of. In addition to paying the administration and maintenance charges at Rock Springs, we pay the City $600.00 a year for the use of the air field and other equipment on the field. That is over and above maintaining and administering the field and paying all charges.

The plaintiff does the actual work of administering and maintaining the field at Cheyenne.

In addition to carrying mail and express for hire, plaintiff carries passengers for hire. Plaintiff is a common carrier. From February 1, 1930, to June 1, 1931, we have carried a total of more than 2,000 passengers through the State of Wyoming. During that period there have been eighteen passengers between the towns of Rock Springs and Cheyenne, some travelling in one direction and some in the other. For every passenger within the State of Wyoming we have had 131 passengers who passed through the State of Wyoming. There is no possibility of apportioning the gasoline used in these airplanes as between

carrying passengers intrastate and those interstate. The additional gasoline required to carry the intrastate passengers is a very small amount, in fact inconsiderable, impossible to determine.

During the period covered by my testimony, the total [fol. 95] number of pounds of mail carried into Rock Springs from Cheyenne has been 1,173 pounds. That includes interstate and intrastate mail. During the same period we carried 2,200,000 pounds of mail through the State of Wyoming. It was slightly more than that.

The amount of gasoline required for carrying the additional weight of the mail into Rock Springs would be no considerable amount. It would be like a man in an automobile if he were driving from here to Laramie, if some one would hand him a packet of letters and he would stick them in his pocket. I do not believe he would burn any more gasoline when he got to Laramie on account of the letters than if he had not had them. The airplane and the mail and the express and the passengers go anyway.

During the period from February 1, 1930, to June 1, 1931, there was no express carried between Cheyenne and Rock Springs.

Cross-examination:

I have held my position as Vice-President of the plaintiff in Charge of Operations, since January, 1929. I was Vice-President when the contract between plaintiff and the City of Cheyenne was entered into and took part in the negotiations leading up to it. At the time the contract was discussed, it was agreed that we were to pay certain rentals to the City of Cheyenne, approximately $3,000.00 for the field and a little more than $1,000.00 for the rental of hangar space in the vicinity of the administration building. It was also provided that a superintendent would be appointed in that field at Cheyenne. Our Company acts as a superintendent in maintenance and upkeep of the field. Mr. Hoare has direct charge. I have general charge. Mr. Hoare has other duties for the plaintiff besides the maintenance of the field. The City pays to the plaintiff $200.00 a month for that superintendence. All of our people at Cheyenne, including the pilots, are interested in the fields and any one can suggest anything that can be done to improve it. These suggestions are made to and carried out by Mr. Hoare.

They include lighting, and as to grades, and runways and all the various things that have been done up there in the last few years.

This contract provides that the City shall keep the air field well maintained and well regulated during the time [fol. 96] plaintiff may occupy any portion of it as a tenant. We have had continuous use of the field since the execution of the contract. The field has been kept in a well regulated and well maintained manner, and adequate accommodations have been provided by the City to the plaintiff under the terms of the contract, and there is no complaint about the way the contract has been carried out. We charged the City approximately $1,000.00 during the last sixteen months for the maintenance work we have done on the field, and I have heard no complaints about that. The City has endeavored to provide a field that would be adequate and proper in every way and is striving to produce an A1A field. It is a pretty good field. I know the cost of the maintenance work on the field. That has been approximately $1,000.00 for the maintenance work done on the field and approximately $1,000.00 for electric current, and in addition there has been paid to the Superintendent $2,400.00 to manage the field. That makes $4,400.00. I believe the lighting was in the original contract. It was not at our request. There was an arrangement made with the City in the contract whereby each one of us would spend some money to do some improvements or work necessary. When it came to having the work done the cost ran considerably over and so the plaintiff went along and put in its 50% right along with the City. The amount we paid in unprotested taxes has exceeded the direct maintenance costs of the field. There is a lot of expense that the City would incur on the field over which we have no control. Some of this is for the benefit and improvement of the field. There may be a difference of opinion as to whether or not they are beneficial. I do not know that the moneys paid without protest are taken over to and received by the City and expended on the field.

Cross-examination.

By Mr. Taliaferro on behalf of Rock Springs:

The contract with Rock Springs provides that the plaintiff shall sell the gas and oils at the air field sold at the air

field, and the plaintiff has exercised that privilege. The figures which I have given for a tax of four cents per gallon on gasoline include only the gasoline used in our own planes and operations and we collected and have paid the four cents from these other people who used the airport, paid that into the State and it eventually got to the City.

We do not have separate receptacles in which we store [fol. 97] the gasoline sold to other airships. We have it stored at the air field. The tax is not paid until the gasoline is used. It is stored there and is property stored in Sweetwater County on that field. Some of it is used by our airships drawn from those tanks as stored on the field and some of the gas is used by other airships.

Questions by the Court:

The gasoline is all stored in one storage tank. When we fill a ship engaged in interstate commerce, we have very accurate gauges on the pumps, and a very careful record is made of the gasoline as drawn out of the tanks. The tax is not paid until the gasoline is used. We do not pay on what we buy until it is used or disposed of.

Cross-examination.

By Mr. Greenwood:

We procure the gasoline from both inside and outside of the State of Wyoming. After we purchase it, part of it is brought to Cheyenne and part to Rock Spring. It is stored in our tanks at Rock Springs or Cheyenne waiting for use at our direction and subject to any use we wish to make of it. It is under our control and is property on the field. It is not determined at the time it is stored whether it goes into interstate commerce or into a ship engaged in that. We determine the amount used in interstate and the amount applied to other purposes at the time it is used. This measurement of the gasoline for the purpose of paying the tax is not directed to us by the State. We measure it in determining the use it is finally put to, and on that basis determine whether we will protest the tax. It is the same kind of property, handled in the same way and stored in the same place until the final application or use occurs.

Questions by the Court:

As I understand the State law, the four cent tax goes to the town where the gasoline is used. All money collected at the Cheyenne airport goes through the State Treasurer's office and then through the City of Cheyenne back to the airport. That is my understanding. When we made two payments at the same time to the State Treasurer, for example, one of $651.68 and the other of $256.32, one of these was for Cheyenne and one for Rock Springs. The reason we made the division was because it was two separate ac-
[fol. 98] counts. We keep a record of the gasoline at Rock Springs separately, and Cheyenne the same way, and it is a matter of convenience in making our reports to make two separate reports.

Redirect examination:

The gasoline for which we have accounted as taken at Cheyenne is made up of two separate quantities each month, one quantity is gasoline put into the tanks in airplanes engaged in interstate flying at Cheyenne, and the other is gasoline used here at Cheyenne in our automobiles and for washing and for running our engines and experiments and for making experimental flights about the field, and things of that kind.

In like manner the gasoline I have testified about as being at Rock Springs is gasoline actually put into the airplanes at Rock Springs, that is the one class, and the other class is gasoline actually used at Rock Springs. None of the gasoline put into any airplane at Cheyenne has been credited to Rock Springs, and none put into any tank at Rock Springs has been credited to Cheyenne, in this testimony.

Cross-examination.

By Mr. Greenwood:

The statute in question imposes a burden on us in our interstate commerce. The mail contract fixes our compensation for carrying mail, and plaintiff has certain rates for passengers and for express.

We display at our airport at Cheyenne and also at Rock Springs a price sign stating the price of gasoline to be re-

tailed there, and that includes the gas tax, notwithstanding the fact that we have not paid that tax on all the gasoline we have there for use.

Redirect:

As to other expenditures by the City of Cheyenne outside the maintenance charges of about $1,000.00 a year and outside of the lighting charges about the same figure, and outside of the superintendent's charge of $2,400.00, the contract with the City provides that between the plaintiff and the City by spending equal amounts certain improvements to the field would be made, at that time estimated to cost approximately $7,000.00. That included certain grading work upon the field and a new lighting system, that is in the boundary lighting and flood lighting, and so on, because the old lighting system was practically useless, and the final [fol. 99] cost of these improvements was in excess of $14,000.00, of which our Company paid $7,000.00 plus to make up an exact half of that total cost. That relates to Section 2 of the contract, which provides that the cost shall be divided fifty fifty. Outside of this gas tax which we paid for gas not used in interstate commerce, we paid over $7,000.00, fifty per cent of the cost of these matters I have mentioned. No other claim was ever made upon plaintiff in reference to that.

As to other expenditures the City put a crushed rock circle out in the middle of the field, which would be of absolutely no benefit to our Company, and we did not pay that. There was no agreement in regard to that crushed rock circle. I do not believe the City even asked the plaintiff to pay half of the cost of that. It would not cost over $100.00 at the outside. Those are all of the expenditures outside of the maintenance $1,000.00, lighting $1,000.00 and superintendence $2,400.00, excepting another addition I did not mention that our Company has provided. That is the lighted wind tee, that cost us approximately $500.00, but the City did not have anything to do with that.

In addition to the amounts paid by the plaintiff as I have stated, we have two buildings of our own out there, which have been constructed since the contract was drawn, and in addition we have made certain improvements to our leased buildings on the air field that belong to the City. Our own

buildings cost in excess of $85,000.00. They are taxed. The rate of tax on our property at that air field is less than four per cent, just slightly under four per cent.

The maximum capacity of one of our tanks at the air field at Cheyenne is 5,000 gallons and of the other tank 2,000 gallons. That is the most we can have there at any one time, 7,000 gallons. And we paid four cents per gallon to the two Treasurers on 375,000 gallons. Our method of making the payments is as directed by the State. For illustration, during the month of June we paid the taxes on gasoline used during May, and these were to be paid before the 15th of the month subsequent to that in which the gasoline was used. None of the tax is paid in advance of the use. It is all paid on the 15th of the month after it is used, and plaintiff has paid all of the four cents per gallon not only on that used locally at the two places but also on all that used in [fol. 100] interstate commerce. The difference between our right to conduct this interstate commerce business without having this tax assessed and the right with the tax assessed is at least $50,000.00. We paid to the City of Cheyenne under our contract approximately $4,000.00 outside of this tax, and that is outside of maintenance and of lighting, and we have paid that. From February 1, 1930, to June 1, 1931, we paid over $2,900.00 on the four cents per gallon tax on gasoline used locally at Cheyenne. Those are the local taxes, the unprotested taxes. That is in addition to the $4,000.00 that we paid under the contract for our rights there.

Our use there is not exclusive. There are a number of other companies using it regularly, and I believe it is classed as a free airport so it can be used by any one who has an airplane and cares to use it. That, of course, is controlled by the City. There is one local concern located at the field, and at the present time there are three regularly operated airplanes that use it in addition to ourselves, besides the one local concern that does not run any regular schedule. All three of these airlines mentioned are interstate operators, and I think they use gasoline locally and in interstate commerce. We do not sell them gasoline, and the company that operates here locally sells most of the gasoline that is sold on the air field out there. We do not sell much, and that local concern operates locally here.

JOSEPH A. FLYNN, a witness called by the plaintiff, testified:

I reside in Cheyenne; am a railway mail clerk, engaged at the air mail field Cheyenne, Wyoming. We distribute all of the air mail labeled for that field. About one pound of mail per ship, including the weight of the equipment, goes to Rock Springs by these airplanes of the plaintiff. The equipment weighs from twelve to thirteen ounces. I have no record of the pounds count of the mail, but believe that it would possibly be 40 air mail letters to the pound. Practically all of that air mail carried by the plaintiff between Cheyenne and Rock Springs is interstate, coming by the plaintiff's airplanes from the outside, from the Omaha and Chicago sealed pouches.

[fol. 101] FRANK G. CALDWELL, a witness called by the plaintiff, testified:

Since July 1, 1927, I have been and still am general superintendent of the Boeing Air Transport lines.

The plaintiff's business is to operate airplanes between Oakland, California, and Chicago, Illinois, for the purpose of transporting mail, passengers and express. The mails are carried under the paper Exhibit A over the entire distance, operating through Iowa City, Des Moines, Omaha, North Platte, Cheyenne, Rock Springs, Salt Lake City, Elko, Nevada, Reno, Nevada, Sacramento, California.

There is an emergency air field at Laramie. The field at Rock Springs is a municipal airport. Our main reason for stopping there is for fuel. The business at Rock Springs is limited. If it were not for the distance involved, I do not believe it would want to stop there except for fuel. We stop only because of the distance between Salt Lake and Cheyenne. That is an incidental stop.

During the period from February, 1930, to June, 1931, we carried approximately 1000 pounds of mail for delivery to points in Wyoming. That is the whole amount of the mails carried for Rock Springs. We also carry express and passengers. From February 1, 1930, to June, 1931, there was

no express carried to or from Rock Springs. During the same period there was some eighteen passengers carried between Cheyenne and Rock Springs, and some 2300 carried through Wyoming as interstate passengers.

Gasoline is the fuel used in the propulsion of these airplanes. No other fuel is available. The mail to Rock Springs is in the same compartment with that carried through Rock Springs. We do not get compensation by the pound for carrying the mail. It would be highly impracticable to fix the value of the gasoline used to carry the Rock Springs part of the commerce from the interstate commerce.

The payments made by me on behalf of the plaintiff on the four cents per gallon tax on gasoline used by plaintiff, were as follows:

[fol. 102] To Mr. Edelman, on gasoline used locally at Cheyenne:

March 15, 1930	$158.84
June 4, 1930	54.76
July 15, 1930	144.72

To Mr. Edelman, on gasoline used locally at Rock Springs:

March 15, 1930	$7.44
July 15, 1930	41.76

To Mr. Weston, on gasoline used locally at Cheyenne:

February 14, 1931	$210.56

To Mr. Weston, on gasoline used locally at Rock Springs:

February 14, 1931	$24.00

On gasoline put into our planes at Cheyenne and Rock Springs and used in interstate commerce:

To Mr. Edelman, on that put into the tanks at Cheyenne:

March 15, 1930	$424.08
June 14, 1930	549.64
July 15, 1930	666.24

To Mr. Edelman, on that put into the tanks at Rock Springs:

March 15, 1930	$181.00
June 14, 1930	275.00
July 15, 1930	314.04

To Mr. Weston, on that put into the tanks at Cheyenne:

February 14, 1931	$820.12
April 13, 1931	806.16

To Mr. Weston, on that put into the tanks at Rock Springs:

February 14, 1931	$492.00
April 13, 1931	490.84

The interstate gasoline placed in the tanks at Cheyenne was used between Cheyenne and east to Omaha and North Platte, and west to Rock Springs and Salt Lake City, and that placed in the tanks at Rock Springs was used to Salt Lake City and points west, and to Cheyenne and points east.

The gasoline other than interstate, otherwise called "local" was used in trucks, automobiles and washing planes, or airplanes, etc. We do a considerable amount of testing. An engine is going for that practically all of the time, and, [fol. 103] as required by the Department of Commerce, we test each airplane where passengers are to be carried after each engine installation. That testing is done at the local field.

Each payment of the four cents tax on interstate gasoline was made under protest.

(Counsel for defendants agreed that the protest was in the form of that introduced in evidence.)

The tax paid on gasoline used locally was not paid under protest. The reason for the payment of the tax of four cents per gallon on gasoline used in interstate commerce was because of the civil and criminal penalties involved if we should refuse to pay. Plaintiff has not had at any time at Cheyenne to exceed 7,000 gallons of gasoline in its supply tanks. We have paid about $15,000.00 as the four cent tax on the gasoline used by the plaintiff in interstate com-

merce. That would be several hundred per cent of the value of the gasoline which we had on hand at any one time. It would be between 30 and 33⅓ per cent of the value of all the gasoline that we used during the entire year.

The plaintiff pays the administration and the maintenance charges at Rock Springs, and over and above that expense pays to Rock Springs $600.00 per year for the use of the air field. The maintenance cost for the air field at Cheyenne is about $1,000.00 per year. That includes the upkeep of the lighting equipment, as well as the upkeep of the actual landing field. Upkeep is keeping the field true, free from ruts. The chief cause of these ruts is the weather, storm and wind. I would estimate that the weather or elements cause 75% of the damage that is done to the field, and then the landing of various planes causes the other 25%.

The use of the air field at Cheyenne by the plaintiff is not exclusive. Others use gasoline there locally. I would estimate that there is more gasoline used locally by these others than there is by the plaintiff.

The difference between the value of the right to use this gasoline in interstate commerce without paying the tax and the value with paying the tax is not less than $50,000.00. This $15,000.00 that we have paid on the interstate gasoline includes the time from February 1, 1930, to May 31, 1931.

[fol. 104] Cross-examination.

By Mr. Greenwood:

No tax has been paid to any other State on the gasoline that plaintiff uses in interstate commerce from Cheyenne.

The gasoline that we sell at Rock Springs is taken from our general storage tanks, and that is true also at Cheyenne. In speaking of the $50,000.00, the value of our right to carry on the interstate commerce without the tax as against the right to carry it on with the tax, that figure was based on what we have already been required to pay and on continuing the payment. Our rates for transporting every bit of the commodities, mail, express and passengers, are computed upon the basis of yielding a profit, whether we paid the tax or not, but the profit will be greater if we do not pay the tax.

Questions by the Court:

We segregate this gasoline for the purpose of making the computations as interstate or intrastate through the use of a metering device. A record is kept of the gasoline used in interstate as well as that used locally or intrastate. If we are putting the gasoline into a plane that is about to start for Oakland, we keep track of what gasoline we put in there. And if it is some plane stationed here and we are putting it under test, we keep a record of the actual amount of gasoline used on the test.

Mr. WILLIAM B. HOARE, a witness called on behalf of the plaintiff, testified:

Since July 1, 1927, I have been Superintendent of Repairs of the plaintiff. I supervise the repairs of airplanes, lay out work for the employees, and sub-supervise the repairs of engines, planes and the fields. My part of the work includes seeing that the fields are always kept in order and well graded and all holes filled up, lighting kept in order, and the fences and lights in good condition.

A man is appointed for three shifts a day to watch it, night and day. I am in charge of it. The chief changing of the surface of the air field is caused by wind, rain, snow and animal life. The landing and taking off of airplanes does not affect the surface a great deal except when the field is bad or wet. Taking it as a whole, 70 to 75% of the [fol. 105] damage to the field is caused by wind and weather; perhaps 65 to 70%. Some of the balance by animal life. About 20% of the damage is caused by landing and taking off of planes.

Plaintiff's use of the field is not exclusive. There are three other airline operators besides the plaintiff, one local concern, and several privately-owned, in addition to whatever transients might go through. I should say plaintiff uses three times as much gasoline in intrastate operation as all of the other local operators.

Mr. COLYER, recalled on behalf of the plaintiff:

We paid the tax on this interstate gasoline in order to avoid the extreme penalties, both civil and criminal, should

we refuse to pay. We paid the property tax on all the gasoline on hand April 1st at Cheyenne and at Rock Springs.

CHARLES B. MORGAN, a witness called on behalf of the defendants, testified:

I am Deputy State Treasurer of Wyoming and reside at Cheyenne. I received the gasoline taxes on gas used or sold in Wyoming and have received certain payments from the plaintiff, and a part of those payments have been made under protest and a part have not. The Treasurer is collecting four cents a gallon tax on all the gasoline that is sold in the State.

And on cross-examination, the witness testified:

That tax is not collected as a property tax at all. It is not a tax levied on property.

F. M. HOWARD, a witness called on behalf of the defendants, testified:

I am City Clerk and Assistant City Treasurer of the City of Cheyenne. Have been such since April, 1924. I have entire charge of cash receipts and disbursements and of making a proper record if it as Assistant City Treasurer and City Clerk. I keep separate accounts for different activities of the City and different items that are paid. The City has in the books which I keep an account with reference to the airport. It shows the receipts and dis- [fol. 106] bursements of all cash applicable to the airport accounts. This account was established in 1930. Prior to that time disbursements were made from an airport budget account under the Department. The budget appropriation for the year 1929 was $8,000.00. The expenditures were $9,508.12. I do not have the total figures for the year on maintenance. I do not have an item on maintenance. That was the year in which the City entered into a contract with the plaintiff. I do not have the items that comprise that $9,508.12. I do not remember when the superintendency disbursements and the rentals did start under that contract.

There is a record in my books of expenditures for purposes of grading and other work to be done to come to the amount of $7,000.00, mentioned in paragraph 2 of the contract. I cannot tell you now how much was spent. The City's half of leveling and grading the field during the year 1929 amounted to $2,232.44. The City's proportion of the leveling and grading expenditure during the year 1930 amounted to $1,780.28. That must be all that was paid out by the City for its half of that work.

My records kept track of the amount that was due from plaintiff on these payments for this new area, and a like amount was charged to them as was paid by the City of Cheyenne.

On October 2, 1930, the City Treasurer received from the State Treasurer $2,845.60 as proceeds of the gasoline tax levied on gasoline sold out there at the airport. On February 18, 1931, the City Treasurer received $2,099.08, proceeds of gasoline tax levied on gasoline sold at the airport. That money was placed in the airport fund. The money that is in that fund is used for maintenance and improvement expenses of the airport and for no other purpose. As against that fund I charge all items that have to do with the maintenance and improvement of the airport at Cheyenne. So far this year up to the close of May, 1931, the airport budget expenditures total $1,488.35. That is for the first five months of this year exclusive of the plaintiff's bills for April and May. Settlements between the plaintiff and the City are made quarterly. The second quarter will not be settled until June.

I have received no other money from the State Treasurer [fol. 107] other than the items mentioned, and that has been expended on the field.

The City has authorized a bond issue of $15,000.00 for further improvement, consisting of additional land and grading and leveling, and fencing, etc.

On cross-examination the witness testified:

These expenditures have been for improvements as well as for maintenance. The amount received October 2, 1930, from the State Treasurer was $2,845.60. My records show the amount October 2, 1930, $2,845.60, and February 18, 1931, the amount received was $2,099.08. These two amounted to $4,944.68.

I have no statement from the State Treasurer as to the class of gasoline this tax was on.

CAL HOLLIDAY, a witness on behalf of the defendants, testified:

I am Mayor of Cheyenne, have been in that office for eighteen months. Have had some experience in operation of airplanes. Am not a licensed pilot. Am a flyer. I am connected with an airplane company in this City, the Cheyenne Air Service. Its principal place of business is at the Cheyenne airport. I have known the conditions at that field for about three years and a half. Have seen plaintiff's airplanes. There are other companies that operate there.

I am familiar with the general use that is made of the field by plaintiff's airships as compared with the others. I would say the plaintiff uses the field the most.

I would say that the testimony of 70 per cent of the deterioration of the field requiring maintenance is due to the elements, rain, snow and wind, is a little bit strong. The wear and tear on the airport is caused from moist conditions and the landing of planes on that soft ground. The field is utilized all of the time, in wet weather as well as dry.

There is a difference in the damage done by a heavy plane and a light one. The plaintiff's airplanes are 40 B's and 95's and trimotors. The trimotors are single motors. The trimotors are the heaviest of the planes that land out there. The effect of the landing of one of these planes [fol. 108] when the surface is moist is about the same as if the wheel of a heavy truck had crossed there. That causes damage to the field. The lighter planes do not cause as much damage as the heavy ones. No Company using the field uses airplanes as heavy as those just mentioned.

If an air field does not have runways enough it must be smooth enough to have an all-runway field in order to become an A1A field. We will have ours smooth enough so that you can take off in any direction. That is partly the purpose of the new acquisition of land for which the bond issue has been voted. The rest of the bond issue was for the grading and smoothing up of the field in general.

I have conferred with the officials of the plaintiff with reference to the conditions of the field. In an off-hand way they have made requests for improvements. If the City says nothing, the plaintiff is allowed to maintain the field the way they think it should be. We could protest against the expenditure of that money and they would stop. There has never been any protest about any expenditures.

Q. And the City pays for all of this maintenance, and these improvements, that have been placed upon this field?
A. They do, now.

There is a gasoline tax received from the State from the use of gasoline used on this field and in the planes of the plaintiff. It has received from other companies as well. My company pays a tax. And these funds that go to the State and then come to the City are included in the airport fund. And expenditures made on that field are debited and credited to the airport fund. This tax money has come into the airport fund of the City and been expended on the field and nowhere else. The amount received last year was equal to the amount expended by the City on the field, but not this year. In saying that I have in mind the expenditures of some $7,000.00 in the past for improvements out there. I do not know exactly how much the City has received from gasoline tax.

And on cross-examination the witness testified:

The gasoline tax received by the City was that part not protested by the plaintiff.

The tax here in controversy, being that on gasoline used [fol. 109] in interstate commerce, has not reached the City Treasurer, that I know of.

That $7,000.00 which the City spent in some grading was only 50% of the amount that grading cost, and the plaintiff paid the rest, and they both agreed to do just that thing as far as I know.

The time during the course of the year when that field is soft from the elements, rain and snow, would probably be thirty days in a year. Maybe that is too high, and the rest of the time it is not soft at all, and the rest of the time an airplane landing there and taking off would make very little impression on that surface. I would not say that the wind does more damage than the rain to the field. The

blowing of the wind eddies out holes and makes it rough, but not too rough. It makes it rough so that it is not as comfortable, and that is one of the things that has to be repaired, with loaded ships. For the itinerant flyer it is not so bad. The air field is used for the purpose of all planes landing and taking off there—Government planes, some of them—and some of them are heavier than the plaintiff's and require the same sort of a smooth air field.

This maintenance of the field is done in accordance with that contract between the City and the plaintiff in carrying out that contract, and they have done that.

O. K. 10-13-31. Richard J. Jackson, Deputy Attorney General of Wyoming, one of the attys. for defendant State Treasurer.

O. K. H. B. Henderson, Jr., Atty. for Deft. City of Cheyenne, a municipal corpn.

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF APPROVAL OF STATEMENT OF EVIDENCE

Be it remembered that the foregoing cause was instituted in this court by a Bill in Equity filed by the plaintiff, Boeing Air Transport, Inc., that the defendants filed Answers to said Bill of Complaint, that the cause has been heard upon the issues arising on said Bill of Complaint and said Answers and the evidence in support thereof. The foregoing Statement of Evidence was duly lodged in the office of the clerk of this court by the solicitors for the plaintiff and notice of such lodgment duly given the solicitors for [fol. 110] the defendants as provided by Federal Equity Rule No. 75 (b), and the court having considered the same now finds the Statement of the evidence as above set forth to be true, correct, complete and properly prepared.

Wherefore the same is hereby approved this 14th day of October, A. D. 1931.

By the Court:

T. Blake Kennedy, United States District Court Judge, District of Wyoming.

To the Honorable T. Blake Kennedy, judge of said court:

The defendant, The City of Rock Springs, has no request to make for an amendment or addition to the transcript, filed by the plaintiff, setting forth in narrative form the evidence given upon the trial of said cause.

Dated October 13th, 1931.

The City of Rock Springs, by T. S. Taliafero, Jr., Its Special Attorney.

In United States District Court

Petition for Appeal—Filed Oct. 14, 1931

To the Honorable T. Blake Kennedy, district judge in and for said district:

The above named plaintiff, Boeing Air Transport, Inc., being aggrieved by the decree made and entered in this cause heretofore, to-wit, on the 23rd day of July, 1931, does hereby appeal from said decree to the Circuit Court of Appeals of the United States for the Tenth Circuit, for the reasons specified in the Assignments of Error filed herewith, and the said Boeing Air Transport, Inc., prays that its appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit.

[fol. 111] This petitioner further prays that an order be entered fixing the amount of the bond for costs to be given by this plaintiff upon such appeal.

John W. Lacey, John U. Loomis, Solicitors and Of Counsel for Plaintiff.

In United States District Court

Assignments of Error—Filed Oct. 14, 1931

Comes now the said plaintiff, Boeing Air Transport, Inc., the appellant herein, and says that the decree entered in this cause heretofore, to-wit, on the 23rd day of July, A. D.

1931, is erroneous and against the just rights of said plaintiff, for the following reasons:

1. The court erred in its finding of fact to the effect that the City of Cheyenne has expended substantial sums of money in improving its airport landing field and maintain the same, and will be compelled to spend additional substantial sums for the same purpose, for that

(a) The said finding of fact is not sustained by sufficient evidence.

(b) Said finding of fact is so indefinite and uncertain that no conclusion of law could be based upon it.

2. The court erred in its finding of fact "that said tax of four cents per gallon on gasoline imposed upon the plaintiff is likewise imposed upon others similarly situated, with the uniform application," for that

(a) Said finding of fact is upon matter outside the issues in said cause and is irrelevant.

(b) Said finding of fact is not sustained by sufficient evidence.

3. The court erred in its finding of fact to the effect "that the plaintiff's gasoline used as an instrumentality of Interstate Commerce for the use of which the four cents per gallon tax is imposed has not previously been subjected to such tax either within or without the State of Wyoming," for that

[fol. 112] (a) Said finding of fact is outside the issues in said cause and is irrelevant.

(b) The said finding of fact is not sustained by sufficient evidence.

4. The court erred in its conclusion of law "that the statute of December 21, 1929, so far as the same levies or attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid under the facts and circumstances" found by the court, for that under the pleadings and the facts and circumstances found the said statute, so far as the same levies

or attempts to levy said tax on or for the use of gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, unlawfully imposes a burden upon interstate commerce in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

5. The court erred in its conclusion of law "that the statute of December 21, 1929, so far as the same levies or attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid, for that as applied to said gasoline as so used as an instrumentality of interstate commerce the said statute under the pleadings and the facts shown by the evidence was and is unconstitutional and void, in that it unlawfully imposes a burden on interstate commerce in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

6. The court erred in its conclusion of law "that the statute of December 21, 1929, so far as the same levies or attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid under the facts and circumstances" found by the court, for that under the pleadings and the facts and circumstances found by the court the said statute, so far as [fol. 113] the same levies or attempts to levy such tax on or for the use of gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce if so applied and enforced impairs, in violation of Section 10 of Article I of the Constitution of the United States, the obligation of the contract of the City of Cheyenne with the plaintiff entered into July 1st, 1929, and prior to the enactment of said statute, in which contract said City agreed that no charge for any use which it might make of the municipal field and landing field at Cheyenne should be

exacted from the plaintiff additional to that in the said contract between the said City and the plaintiff specifically provided.

7. The court erred in its conclusion of law "That the statute of December 21, 1929, so far as the same levies or attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid for that under the pleadings and the facts shown by the evidence the said statute, so far as the same levies or attempts to levy such tax on or for the use of gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, if so applied, and enforced, impairs, in violation of Section 10 of Article I of the Constitution of the United States, the obligation of the contract of the City of Cheyenne with the plaintiff entered into July 1st, 1929, and prior to the enactment of said statute, in which contract said City agreed that no charge for any use which it might make of the municipal field and landing field at Cheyenne should be exacted from the plaintiff additional to that in the said contract between the said City and the plaintiff specifically provided.

8. The court erred in its conclusion of law that plaintiff's action, so far as relates to the collection and threatened collection under the Wyoming statute of December 21, 1929, of the tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used in propelling said airplanes in plaintiff's interstate commerce, should be dismissed on the merits, for that under the pleadings and the facts and circumstances found by the court (and likewise [fol. 114] under the pleadings and the facts shown by the evidence) plaintiff was and is entitled to the conclusion of law that the pleadings and the facts require an injunction against the City of Cheyenne and against the State Treasurer acting for its benefit enjoining the collection of such taxes as unlawfully burdening interstate commerce and unlawfully impairing the obligation of the contract of Cheyenne under its contract of July 1, 1929.

9. The court erred in its conclusion of law "that the statute of December 21, 1929, so far as the same levies or

attempts to levy a tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Rock Springs and used as an instrumentality of interstate commerce in propelling plaintiff's airplanes in such commerce, was and is constitutional and valid under the facts and circumstances," found by the court for that as applied to said gasoline as so used as an instrumentality of interstate commerce the said statute under the pleadings and the facts found (and likewise under the pleadings and the facts shown by the evidence) was and is unconstitutional and void, in that it unlawfully imposes a burden on interstate commerce in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

10. The court erred in its conclusion of law to the effect "That this action by the plaintiff, so far as relates to the collection and threatened collection under the Wyoming statute of December 21, 1929, of the tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Cheyenne and used in propelling plaintiff's airplanes in interstate commerce, should be dismissed on the merits," for that instead of the conclusion of law last aforesaid, the pleadings and the facts found by the court (and likewise the pleadings and the facts shown by the evidence) required a conclusion of law that the injunction as to said taxes should be granted as prayed for.

11. The court erred in its conclusion of law to the effect "that this action by the plaintiff, so far as relates to the collection and threatened collection under the Wyoming statute of December 21, 1929, of the tax of four cents per gallon on gasoline taken into plaintiff's airplanes at Rock Springs and used in propelling plaintiff's airplanes in interstate commerce, should be dismissed on the merits," for that instead of the conclusion of law last aforesaid, the pleadings and the facts found by the court (and likewise the pleadings and [fol. 115] the facts shown by the evidence) required a conclusion of law that the injunction as to said taxes should be granted as prayed for.

12. The court erred in its decree.

(a) In so far as the said decree denied the injunction prayed for in relation to the taxes complained of on gasoline

taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce.

(b) In so far as the said decree dismissed on the merits plaintiff's cause so far as relates to the taxes complained of on gasoline taken into plaintiff's airplanes at Cheyenne and used as an instrumentality of interstate commerce.

(c) In so far as the said decree denied the injunction prayed for in relation to the taxes complained of on gasoline taken into plaintiff's airplanes at Rock Springs and used as an instrumentality of interstate commerce.

(d) In so far as the said decree dismissed on the merits plaintiff's cause so far as relates to the taxes complained of on gasoline taken into plaintiff's airplanes at Rock Springs and used as an instrumentality of interstate commerce.

Wherefore, plaintiff prays that the said decree and order of the court may be reversed and for such other and further relief as to the court may seem just and proper.

John W. Lacey, John U. Loomis, Attorneys for Plaintiff.

In United States District Court

Order Allowing Appeal—Filed Oct. 14, 1931

This cause coming on now to be heard this 14th day of October, 1931, upon the petition of the plaintiff for an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and the Court being fully advised, does hereby grant said petition and allow said appeal, and does hereby fix the sum of Five Hundred Dollars ($500.00) as the amount of the bond for costs to be given by said plaintiff on said appeal.

[fol. 116] Dated this 14th day of October, A. D. 1931.

T. Blake Kennedy, Judge.

[Bond on appeal in the sum of $500, approved by the District Judge, with Appellant as principal and Fidelity &

Deposit Company of Maryland as surety, was filed in the District Court on Oct. 14, 1931.]

[Citation in proper form, directed to Appellees, with acceptance of service by counsel for said Appellees, was filed in the District Court on Oct. 24, 1931.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Oct. 20, 1931

To Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming:

You are hereby requested to prepare a transcript on appeal in the above entitled case and to include therein the following portions of the record, to-wit:

1. Bill of Complaint, filed November 25, 1930, omitting therefrom the statutes appearing as Exhibits.
2. Separate Answer of the Defendant, The City of Rock Springs, filed December 18, 1930.
3. Separate Answer of the defendant, The City of Cheyenne, filed December 27, 1930, omitting therefrom the Exhibit A, being the contract between the plaintiff and the City of Cheyenne, and in connection with said Answer refer to the copy of said contract as set out in the narrative statement of the evidence.
4. Separate Answer of the Defendant, W. H. Edelman, State Treasurer, filed December 16, 1930.
5. Supplemental Bill of Complaint, filed May 26, 1931.
6. Stipulation re Supplemental Bill of Complaint, filed May 26, 1931.
7. Memorandum opinion by Judge Kennedy, filed June 27, 1931.

[fol. 117] 8. Findings of Fact, Conclusions of Law and Decree, filed July 23, 1931.

9. Narrative Statement of Evidence, including approval by court, filed August 20, 1931.
10. Petition for Appeal, filed October 14, 1931.
11. Assignment of Errors, filed October 14, 1931.
12. Order allowing appeal, filed October 14, 1931.
13. Bond, filed October 14, 1931.

14. Citation, including proof of service, dated October 14, 1931.

John W. Lacey, John U. Loomis, Attorneys for Plaintiff.

Service of the attached Præcipe for Transcript by copy is acknowledged this 16th day of October, 1931.

J. A. Greenwood, Attorney General of Wyoming and Attorney for Defendants, William H. Edelman, State Treasurer, and Harry R. Weston, State Treasurer. H. B. Henderson, Jr., Attorney for Defendant, The City of Cheyenne. T. S. Taliaferro, Jr., Attorney for Defendant, The City of Rock Springs.

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT—Filed Oct. 24, 1931

To Charles J. Ohnhaus, Clerk of the District Court of the United States for the District of Wyoming:

You are hereby requested to prepare a transcript on appeal in the above entitled case and to include therein the following portions of the record, to-wit:

[fol. 118] 1. Order entered on Stipulation re Supplemental Bill of Complaint.

2. Election as to printing transcript.

3. Præcipe and Supplemental Præcipe for record.

John W. Lacey, John U. Loomis, Attorneys for Plaintiff.

Service of the attached Supplemental Præcipe for Transcript by copy is acknowledged this 20th day of October, 1931.

Richard J. Jackson, Dep. Attorney General of Wyoming and One of the Attorneys for Defendants, William H. Edelman, State Treasurer, and Harry R. Weston, State Treasurer. H. B. Henderson, Jr., Attorney for Defendant, The City of Cheyenne. T. S. Taliaferro, Jr., Attorney for Defendant, The City of Rock Springs.

John W. Lacey of Cheyenne, Wyo., for Plaintiff.

James A. Greenwood, Attorney General of Wyoming, and Richard J. Jackson, George W. Ferguson and Philip S. Garbutt, Assistant Attorneys General, all of Cheyenne, Wyo., for Defendant State Treasurer.

Harry B. Henderson, Jr., of Cheyenne, Wyo., for Defendant City of Cheyenne.

T. S. Taliaferro, Jr., and F. D. Johnson of Rock Springs, Wyo., for Defendant City of Rock Springs.

Judge's Memorandum—Filed June 27, 1931

Kennedy, Judge:

Decided June 27, 1931.

[fol. 119] This is a suit in equity in which the plaintiff seeks to restrain the enforcement of a state law in regard to the collection of a gasoline tax upon the gasoline used by the plaintiff in its operation of an air line in interstate commerce in connection with the use of airports at the Cities of Cheyenne and Rock Springs in the State of Wyoming. The prayer of the bill seeks an interlocutory injunction and upon final hearing a permanent injunction against the collection of such tax.

The set-up of the case is one which would seem to bring it within the purview of a statutory court of three judges (28 U. S. C. A. 380), but as no action was taken by the plaintiff to move for a hearing upon an interlocutory injunction, the case proceeded to final hearing before a single judge without objection on the part of the defendants and we assume therefore, that the court has jurisdiction of the proceeding. Seaboard Air Line Railway v. Railroad Commission, 213 Fed. 27 (C. C. A. 5).

The substance of the statutory enactment challenged by the plaintiff as being unconstitutional in regard to the interstate business of the plaintiff is found in Chapter 14 of the Session Laws of Wyoming, 1929, Special Session, reading as follows:

"On and after April 1, 1929, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others,

or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of four cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation. Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, beginning with the [fol. 120] first calendar month after this Act has become effective, render a true statement to the State Treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided that before making the distribution of funds provided for in Section 1 hereof the State Treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field."

Upon the final hearing testimony was adduced by the parties and the following may be considered as a sketchy outline of the facts in the case.

The plaintiff is a corporation organized and existing under the laws of the state of Washington and engaged in the operation of an air transport line upon regular schedule between Chicago, Illinois, and San Francisco, California. In such operation it enjoys a contract with the United States government in the transportation of United States mails and likewise transports passengers and express for hire over its entire line. The substantial portion of its business is interstate, in fact the testimony shows that its transportation of mails, passengers or express within the state of Wyoming is an insignificant percentage

of its entire business so that it would be impractical and impossible to determine or estimate the relative amount of gasoline which would be consumed in carrying on its intrastate business. In the operation of its air line it makes use of two landing fields owned by the defendant Cities of Cheyenne and Rock Springs, respectively, at which points its planes are regularly landed on schedule for the discharge and reception of mail, passengers and express. At these points its planes are refueled, examined and conditioned. Some time after the passage and operation of the law which the plaintiff challenges, it began a segregation of the gasoline used by it by tolling the amount of such gasoline which was used for the operation of its ships, traveling in interstate commerce, as distinguished from the gasoline which was used in the testing of airships at the field, conditioning its motors and sales made to other airplane users. As to the first mentioned gasoline, the tax of four cents per gallon was paid to the State Treasurer [fol. 121] under protest in consideration of the high penalties fixed for a violation of the statute, but as to the latter classification of gasoline the said tax was paid thereon to the State Treasurer without protest. During the period covering substantially eight months, from the 15th of March, 1930, to the 15th of November, 1930, the plaintiff paid to the State Treasurer in the amount of this protested tax, the sum of $5,529.28, representing the tax upon gasoline used in interstate commerce at the Cheyenne field and during the same period it paid to the State Treasurer $2,726.32 as representing the tax upon gasoline used in interstate commerce at the Rock Springs field. Testimony was likewise offered as to the continuing payments of said protested and unprotested amounts after the filing of the bill and substantially up to the final hearing. The amount testified to as having been paid of the unprotested tax is considerably less than that paid as the protested tax at both airports. The City of Cheyenne entered into a contract with the plaintiff Company some time in the year of 1929 which provided for the use of the municipal air field by the plaintiff in the operation of its transcontinental air line. The provisions of such contract are numerous and not all of them are material to the matter here being considered. Among other provisions of the contract it

may be said that the plaintiff and the city were to share the expense of grading additional land and building a new outlining lighting system at a cost of $7,000.00. The city agrees to acquire additional land for the airport for which it should pay the expense and that it should keep the field during the term of the lease (designated as twenty-five years), as a well maintained and well regulated airplane landing field for the reasonable use of any and all planes and airships operated by the paintiff. In addition, the plaintiff agrees to pay the city an annual rental of $1,050.00 for hangar space and taxi-ways and $3,000.00 for rental of several hangars located on the field and owned by the city. The city agrees to pay the plaintiff $2,400.00 a year for the general supervision of the field, under the general direction of the city. Similar contract relations exist between the plaintiff and the city of Rock Springs but of less magnitude owing to the smaller business of the Company at that point, but involving a rental there paid by the plaintiff of $600.00 per year. At both ports the plaintiff has the privilege of selling gasoline to the public for airplane purposes. As to the city of Cheyenne, the money received from the [fol. 122] State Treasurer representing this tax on gasoline used at the airport is placed in an airport fund and used exclusively for the purpose of improving and maintaining the airfield. During the year last past not all of the money so received and maintained in this separate fund had been expended but all of which had been expended was expended in connection with the airport. No direct testimony was offered by the city of Rock Springs as to its segregation of this money received from the State Treasurer, except as it may be inferred that the general purpose of the law would be carried out by that municipality. In Cheyenne, at a recent popular election, a bond issue was voted upon and approved by the people authorizing the expenditure of $15,000.00 for various purposes in connection with the improving of its municipal airfield.

Under these circumstances the plaintiff contends that the law requiring the payment of the tax of four cents per gallon so segregated and used by it in the operation of its air line in interstate commerce is unconstitutional as applied to the plaintiff, in that it is in direct contravention of the commerce clause of the constitution. Counsel in

such contention rely principally upon the case of Helson v. Kentucky, 279 U. S. 245, where the state of Kentucky attempted to tax 75% of the gasoline consumed within the limits of Kentucky by a ferry boat operating exclusively in interstate commerce. The court through Mr. Justice Sutherland at page 248 expresses the gist of the decision in the following language:

"The claim under the commerce clause of the federal Constitution was denied on the ground that the tax was confined to gasoline used within the limits of the state and the commerce clause was not affected. It is with the latter question only that we are here concerned.

Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution." * * * "The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. Gloucester Ferry Co. v. Pennsylvania, supra, [fol. 123] p. 204. A state cannot 'lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.' Leloup v. Port of Mobile, 117 U. S. 640, 648; Lyng v. Michigan, 135 U. S. 161, 166; Ozark Pipe Line v. Monier, 266 U. S. 555, 562. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. Adams Express Company v. Ohio, 166 U. S. 185, 218."

Later in the decision at page 252 the following language is used:

"The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate

commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States.' Gloucester Ferry Co. v. Pennsylvania, supra, p. 214."

In U. S. Airways v. Shaw, 43 Fed. (2) 148, a statutory court in the Tenth Circuit sitting in the Western District of Oklahoma decided a case similar in many respects to the [fol. 124] case at bar, by declaring the statute invalid. The substance of the decision is fairly set forth in paragraphs one and two of the syllabus, which read as follows:

'State statute levying excise tax on gasoline held invalid as interference with interstate commerce as applied to air transportation companies engaged in interstate transportation business (Const. art 1, * 8, cl. 3; Laws Okl. 1923, c. 239, as amended by Laws 1923-24, c. 101, Laws 1925, c. 198, and Laws 1929 (Sp. Sess.) cc. 278, 279).

Complaining parties are engaged in the transportation by airplane of passengers, freight, express, and mail from points outside to points within the state and vice versa. Gasoline used as motor power in airplanes in question is purchased largely within state, and tax in question is paid through consignees and distributors of gasoline."

"Intrastate operation of air transportation company held interdependent with interstate commerce, rendering gasoline used in intrastate business not subject to excise tax (Const. art. 1, * 8, cl. 3; Laws Okl. 1923, c. 239, as amended by Laws 1923-24, c. 101, Laws 1925, c. 198, and Laws 1929 (Sp. Sess.) cc. 278, 279).

Airway companies engaged in interstate transportation business carrying passengers, freight, express, and mail from points outside to points within state, and vice versa, conducted a like intrastate transportation business without which interstate transportation business could not be efficiently and economically conducted."

Later a statutory court again in the Tenth Circuit sitting in the District of New Mexico rendered a similar decision in Midcontinent Air Express Corp v. Lujan, 47 Fed. (2) 266, holding that a tax upon gasoline used by a transport corporation in interstate commerce where it was likewise engaged in intrastate commerce and incidental to the former, made the entire tax bad. The gist of the decision is fairly suggested in the second paragraph of the syllabus reading as follows:

"Excise tax upon all gasoline used by air transport corporation engaged in interstate commerce and intrastate commerce incidental thereto held direct burden on interstate commerce, ... therefore invalid (Comp. St. N. M. 1929, ** 60-101, 60-203).

[fol. 125] Air transport corporation operated from point in Texas through state of New Mexico to point in Colorado, and engaged in transporting passengers, freight, and express for hire. It also carried on intrastate business, but such business was merely incidental to interstate business. Two classes of business were so interdependent and so commingled, both with reference to receipts and expenses, that amount of gasoline used in each could not be determined and apportioned."

It is not contended that the entire tax on gasoline used at the airports in this case is invalid, for the reason that it is capable of segregation and actually has been segregated as to its use in interstate commerce and intrastate commerce and only the enforcement of the law which purports to levy and collect the tax upon gasoline used in interstate commerce is challenged.

Were the situation in the case at bar in all respects analogous to the cases last cited, it would require no further comment from this court as to those decisions ruling this case, especially in view of the fact that three of the distinguished present Circuit Judges (Cotteral, Phillips and

McDermott) of the Tenth Circuit sat upon the statutory courts. But there is another angle of the case which makes it less clear to me on account of a peculiar feature of the statute in question. The last paragraph of the statute provides in substance, that the tax received from gasoline used at any municipal airfield be paid by the State Treasurer receiving the same to the city where such airfield is located to be used for the maintenance and improvement of such field. The query in the mind of the court is as to whether or not this does not bring the statute in question within the scope of another line of cases presenting a different feature of the law. The thought can be best expressed by a reference to some of these. In Hendrick v. Maryland, 235 U. S. 610, which is a case concerning a graduated license fee on motor vehicles engaged in interstate commerce, Mr. Justice McReynolds in speaking for the court at page 623-624 says:

"In view of the many decisions of this court there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and [fol. 126] the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. Transportation Co. v. Parkersburg, 107 U. S. 691, 699; Huse v. Glover, 119 U. S. 543, 548, 549; Monongahela Navigation Co. v. United States, 148 U. S. 312, 329, 330; Minnesota Rate Cases, 230 U. S. 352, 405; and authorities cited. The action of the State must be treated as correct unless the contrary is made to appear. In the instant case there is no evidence concerning the value of the facilities supplied by the State, the cost of maintaining them, or the fairness of the methods adopted for collecting the charges imposed; and we cannot say from a mere inspection of the statute that its provisions are arbitrary or unreasonable."

In Postal Telegraph Cable Company v. City of Richmond, 249 U. S. 252, involving a tax to be paid by a telegraph company engaged in interstate and intrastate business, Mr. Justice Clarke at page 259-260, says:

"Even if the net returns from the intrastate business should not equal such tax and it must be paid from interstate earnings, this alone would not be conclusive against its validity. If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business must pay its way,—in this case for its right of way and the expense to others incident to the use of it. St. Louis v. Western Union Telegraph Co., 148 U. S. supra, pp. 98, et seq.; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 163; St. Louis v. Western Union Telegraph Co., 149 U. S. 465. Such compensation should also include the expense of inspection of the poles and wires used, and of such supervision of the business of the company conducted in the streets, as may be reasonably necessary to secure the safety of life and property of the inhabitants and of the users of the streets; but with the authority in the courts, on proper application, to determine whether, under the conditions prevailing in a given case, the charge made is reasonably proportionate to the service to be rendered and [fol. 127] the liabilities involved, or whether it is a disguised attempt to impose a burden on interstate commerce. St. Louis v. Western Union Telegraph Co., 148 U. S. 92; St. Louis v. Western Union Telegraph Co., 149 U. S. 465; Postal Telegraph-Cable Co. v. Baltimore, 156 U. S. 210; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 163; Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 566; Western Union Telegraph Co. v. Richmond, 224 U. S. 160, 169."

In Kane v. State of New Jersey, 242 U. S. 160, involving the registration fee of vehicles of non-residents moving in interstate commerce, a paragraph of the syllabus reads as follows:

"As applied to vehicles of non-residents moving in interstate commerce as well as to vehicles of residents, the amount of the registration fee may properly be based not only on the cost of inspection and regulation, but also on the cost of maintaining improved roads."

In Clark v. Poor, 274 U. S. 554, Mr. Justice Brandeis in discussing a tax upon motor vehicles operating as common

carriers exclusively in interstate commerce, at page 556-557, says:

"The plaintiffs claim that, as applied to them, the Act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. Morris v. Duby, ante, p. 135; Hess v. Pawloski, ante, p. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost & up-[fol. 128] keep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jersey, 242 U. S. 160. Compare Packard v. Banton, 264 U. S. 140, 144."

Later the same Justice in Sprout v. City of South Bend, 277 U. S. 163, in discussing a license fee imposed upon those engaged in interstate commerce at page 169 says:

"It is true that, in the absence of federal legislation covering the subject, the State may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses in a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded. Hendrick v. Maryland, 235 U. S. 610, 622; Kane v. New Jersey, 242 U. S. 160; Morris v. Duby, 274 U. S. 135; Clark v. Poor, 274 U. S. 554. Compare Hess v. Pawloski, 274 U. S. 352. These

powers may also be exercised by a city if authorized to do so by appropriate legislation. Compare Erb v. Morasch, 177 U. S. 584, 585; Mackay Telegraph Co. v. Little Rock, 250 U. S. 94, 99. Such regulations rest for their validity upon the same basis as do state inspection laws, Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345; Red "C" Oil Co. v. Board of Agriculture, 222 U. S. 380, and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of poles and wires. Western Union Telegraph Co. v. New Hope, 187 U. S. 419; Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, 258; Mackay Telegraph Co. v. Little Rock, 250 U. S. 94, 99."

The most recent pronouncement of the high court called to my attention, is that found in Interstate Transit Co., Inc. v. Dick Lindsey, decided April 13, 1931. In that case a tax imposed by the State of Tennessee on busses engaged in interstate commerce was held unconstitutional. The basis of the decision, however, is the fact that the Tennessee statute was upon its face not enacted for any purpose [fol. 129] looking to the construction and maintenance of the state highways, but was merely a privilege tax for the carrying on of interstate business. The pertinent portion of the opinion setting forth legal principles which may be said to apply to the case at bar is as follows:

"While a State may not lay a tax on the privilege of engaging in interstate commerce, Sprout v. South Bend, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. Kane v. New Jersey, 242 U. S. 160, 168-169; Clark v. Poor, 274 U. S. 554; Sprout v. South Bend, supra, pp. 169-170. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mile-

age tax directly proportioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland, 235 U. S. 610, 612; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250-252. Compare Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51. But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity."

Applying the principle of these decisions to the facts and the statute in the case at bar, it seems to me, it falls within such principle and must be ruled accordingly. Certainly there can not be said to be substantial distinction because in the case at bar the tax is not assessed by the municipality but is assessed under a state law and later turned over to the municipality for the particular use designated. The result to the plaintiff is, of course, the same. Here, the tax on the gasoline used by the plaintiff in interstate commerce is returned directly to the municipality for the main- [fol. 130] tenance and improvements of the air fields which the plaintiff is using and in the end results in a benefit to the plaintiff. Under the logic of the decisions above cited, even interstate commerce must assist in paying its own way. The evidence in the case shows beyond peradventure, that the much greater portion of the airplane traffic at these municipal ports is that of plaintiff in the operation of its interstate planes. Presumably, therefore, it would secure the greater benefit in the matter of enlargement, improvement and maintenance of the fields at high standard. Neither can we see any way to make a substantial distinction for the purposes of the question here, between the maintenance of city streets or public highways as discussed in the Supreme Court cases and an airplane landing field open to all planes for general use. The facility of good operating conditions, although different in the matter of use, is apparent in both.

The only limitation under such circumstances is that the tax should not be discriminatory and that it should be no

larger in amount than is reasonably necessary to carry on the legitimate purpose for which it is intended. Sprout v. South Bend, supra. As to the amount of such tax as compared with its use to the purposes intended, it depends largely upon the judgment of the taxing authority, so long as the rule of reason is in control. Hendricks v. State of Maryland, supra. Neither is reasonableness of the tax to be measured merely by the value of the land occupied, or the profits of the business, or by the amount expended in any particular year. Western Union Telegraph v. New Hope, 187 U. S. 419.

Considering the entire evidence in this case, taking into account all the expenses that the municipalities have heretofore had, are having and contemplate having in the future in the matter of improving their municipal airports, I am not prepared to say that the tax so challenged is not fairly commensurate with the general purposes for which it is intended. We all know that municipalities throughout the land are continually expending from time to time many thousands of dollars in acquiring, perfecting and improving their airports in the matter of keeping pace with the great forward strides of air transportation. It seems but fair that all this should be taken into consideration in determining the issues in this state. The airports of the future must be made great terminal facilities to accommo-
[fols. 131 & 132] date this ever increasing traffic and any tax received and devoted exclusively to this purpose will undoubtedly in the stretch of time be inadequate to meet the reasonable demands of extension and improvement.

For the reasons stated, findings, conclusions and a decree may be submitted, dismissing the bill at plaintiff's cost and reserving to it proper exceptions.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] Appearances of counsel omitted in printing.

[fol. 134] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

ORDER OF SUBMISSION

Third Day, April Term, Wednesday, April 13th, A. D. 1932

Before Honorable Robert E. Lewis, Circuit Judge, Honorable George T. McDermott, Circuit Judge, and Honorable John C. Pollock, District Judge.

This cause came on to be heard and was argued by counsel, William M. Allen, Esquire, and John W. Lacey, Esquire, appearing for appellant, and Thomas S. Taliaferro, Jr., Esquire, Harry B. Henderson, Jr., Esquire, George W. Ferguson, Esquire, and James A. Greenwood, Esquire, appearing for appellees.

On motion, appellant was granted leave to file twenty printed copies of a reply brief in this cause, instanter, which was accordingly done.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT OF APPEALS

No. 578—September Term, 1932

Mr. John W. Lacey and Mr. William M. Allen (Messrs. Lacey & Loomis, Mr. Eugene Luccock, and Messrs. Todd, Holman & Sprague were with them on the brief), for appellant.

Mr. Thomas Seddon Taliaferro, Jr. (Mr. Fred W. Johnson was with him on the brief), for appellee, The City of Rock Springs.

Mr. James A. Greenwood, Attorney General, Mr. George W. Ferguson, Assistant Attorney General, and Mr. Harry B. Henderson, Jr., Attorney for the City of Cheyenne (Mr. Richard J. Jackson, Deputy Attorney General, and Mr. Philip S. Garbutt, Assistant Attorney General, were with them on the brief), for appellees, State Treasurer and City of Cheyenne.

[fol. 135] Before Lewis and McDermott, Circuit Judges, and Pollock, District Judge

OPINION—Oct. 4, 1932

LEWIS, Circuit Judge, delivered the opinion of the court:

Appellant, a corporation under the laws of the State of Washington, brought this suit seeking an injunction against the State Treasurer of Wyoming restraining him from collecting from appellant a license tax imposed by the statutes of Wyoming on gasoline to be used by appellant in its airplanes in the transportation of passengers, express and United States mail in interstate commerce, and to recover the tax theretofore paid. In appellant's business its planes, carrying both intrastate and interstate commerce, ply between Chicago, Illinois and Oakland, California, and by written agreements with Cheyenne, Wyoming, and Rock Springs, Wyoming, the planes land on municipal fields, at each of those places and take on gasoline, that being the fuel used to generate the needed power in flights.

The bill charges that the Wyoming statute is an interference with and a burden on that commerce in violation of Clause 3, Section 8, Article I of the Constitution of the United States, and is therefore illegal and void, "in that the said statutes purport to impose and levy, and do impose and levy a tax on all gasoline purchased or consumed as fuel in Wyoming to propel airplanes flying between the said State and neighboring States in interstate commerce, thus exacting the said tax as the price of the privilege of using an instrumentality of interstate commerce and thus evading the exclusive power of Congress to regulate commerce between the several states." It is further charged:

"that under the provisions of said statutes the wholesale distributors or consignees of gasoline are made agents of the State of Wyoming for the purpose of collecting said gasoline tax, said agents acting under the direction of the defendant, State Treasurer, and while the said distributors and/or consignees of gasoline actually collect, return and remit said tax to the State of Wyoming and to the defendant, the State Treasurer, said gasoline tax is in law and in practice levied and imposed against the consumer of

said gasoline within the State of Wyoming and not against the wholesale distributor or consignee, and such tax is paid [fol. 136] by all such consumers, ordinarily direct to the defendant, the Treasurer of the State of Wyoming, which said tax this plaintiff has been forced to pay in order to purchase or consume any gasoline in the State of Wyoming, and will hereafter be forced to pay until defendant, his agents, servants, employees, workmen and other persons acting by and through him are enjoined and restrained from collecting the same by order of this court. * * *

"Plaintiff further avers that * * * the plaintiff in order to continue to operate its said airplanes in the conduct of its said business is compelled to purchase from time to time, and from day to day, large quantities of gasoline in the State of Wyoming, and that no such distributor or any other dealer in said State will sell such gasoline to the plaintiff unless the plaintiff so purchasing the same shall make payment of the said tax levied and assessed thereon at the time of the purchase thereof and that hence the plaintiff is unable to purchase any gasoline in the State of Wyoming for the operation or propulsion of its said airplanes without at the time paying the said tax thereon, and plaintiff alleges that by the express provisions of said Acts and/or by the practical operation thereof by the defendant and the legal effect thereof the said tax is absorbed in the price paid for all gasoline purchased in Wyoming for use or consumption in said State by the purchaser, including this plaintiff, and that under the provisions of said Acts the said tax, although required to be collected and returned to the State by the distributor of or dealer therein as the agent of the State, is both in practice and in legal effect a tax on the consumer of such gasoline * * *."

It is further alleged in the bill:

"That a part of such gasoline used by the plaintiff is purchased by and delivered to the plaintiff in the State of Wyoming; that a part thereof is purchased outside of said State; and that such gasoline purchased and delivered to the plaintiff either in or outside of said State of Wyoming is used and consumed by it as fuel for the propulsion of its

said airplaines in its interstate commerce and business as aforesaid, and is an instrumentality of interstate commerce."

[fol. 137] That there has been exacted of it, and it has paid said tax amounting to several thousand dollars on gasoline so used by appellant in interstate commerce, whether purchased or delivered to it in the State of Wyoming or elsewhere, under protest, because of threatened criminal and civil penalties authorized by the statute for non-payment.

The statute was first passed in 1923. It levied a tax of one cent on each gallon of gasoline sold or used within the state. It has been amended at every subsequent session. We think it plain that the original act and as amended imposes the tax only against wholesalers as that term is defined in the original act. Section 1 of the original act (Session Laws, Wyoming, 1923, Chapter 73) defined wholesalers thus:

"'Wholesaler' is hereby defined as any person, firm, or corporation who imports or causes to be imported gasoline, as herein defined, for sale in the State of Wyoming to the jobber or consumer, or to the persons, firms, corporations, or associations of persons, who, in turn, sell to the jobber or consumer. The term 'wholesaler' is further defined to mean any person, firm, or corporation who produces, refines, manufactures, blends, or compounds gasoline in the State of Wyoming for use, sale or distribution in this State."

Section 3 required that every wholesaler, as defined in the act, who was then engaged or should engage in the sale or use of gasoline, should not later than the fifteenth of each month render a statement to the State Treasurer showing the amount of gasoline sold or used in the state during the preceding calendar month, and to pay to the State Treasurer at the same time the license tax of one cent per gallon on all such gasoline. That act also required that every wholesaler should keep a record of all purchases, receipts, sales, and distribution of gasoline, and that the funds received from the license tax by the State Treasurer should be used for the maintenance of highways. Section 6 of the original act made it unlawful for any wholesaler to

sell or offer gasoline for sale while delinquent in the payment of the tax or any part thereof. It imposed penalties, civil and criminal, for violations of that provision. The amount of the tax was thereafter raised at subsequent sessions until it was four cents per gallon prior to and at the time this suit was brought.

[fol. 138] Section 3 of the original act was amended at the session of 1927. It did not change the requirement of the original act that the wholesaler should pay the tax, but that amendment further provided:

"Every person who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the twenty-fifth day of each calendar month * * * render a true statement to the State Treasurer duly signed and sworn to, and accompany such statement with the payment of the tax of three cents per gallon on all gasoline, as shown by such statement to have been used by him."

Section 4 of the amendatory act of 1927 required that every person or corporation who should have in his possession for the purpose of sale, or should sell or offer for sale, gasoline for motor vehicles, should display in a conspicuous place a sign showing the price at which said gasoline would be sold and the amount of tax thereon, and that neglect in that respect would constitute a misdemeanor subjecting the offender to fine or imprisonment.

At the general session of 1929 the legislature provided that reports to the State Treasurer of all gasoline sold or used during the preceding month should be made by wholesalers, and that the wholesaler should at the same time pay to the State Treasurer a license tax of four cents per gallon on all such gasoline. Thereafter at a special session in 1929 the legislature again amended section 3 of the original act so that it read thus:

"On and after April 1, 1929, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month render to the

State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and to pay to the State Treasurer at the same time, the license tax of four cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an indi-[fol. 139] vidual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation. Every person, firm or corporation, who shall use any gasoline in this State, upon which the said tax has not been paid by any wholesaler in this State, shall, on or before the 15th day of each calendar month, beginning with the first calendar month after this Act has become effective, render a true statement to the State Treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided that before making the distribution of funds provided for in Section 1 hereof the State Treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field."

The latter half of said section 3, supra, as amended at the special session beginning with the words "Every person, firm or corporation, who shall use any gasoline in this State, upon which the said tax has not been paid by any wholesaler in this State," makes it plain, we think, that the tax is primarily imposed against a wholesaler.

In substance and effect the facts here are not different from those in the case of Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U. S. 147. In that case the Transport Company complained that a license tax of six cents a gallon, imposed on those who sold gasoline, was required to be paid by it for gasoline used in its planes in interstate commerce when it purchased the gasoline in South Carolina, and that the six cents was a direct burden upon interstate commerce. The court said:

"So far as the present question is concerned, the distinction (between an excise tax and a property tax) is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority [fol. 140] to tax, although the property might actually be used in interstate commerce. * * * There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate commerce and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected."

Appellant in argument and brief puts emphasis on the word "use" found in the latter part of section 3, supra, and says it is a use tax, and the use was in interstate commerce, relying on Helson v. Kentucky, 279 U. S. 245. It may be conceded that the forepart of this section imposes a use tax against the wholesaler on that part of the gasoline that it consumes; but that is not the tax involved here. The tax here under consideration is the license tax against the wholesaler exacted of him for the privilege of carrying on the business of selling gasoline, and when appellant made its purchases it had an option under the statute of then paying the tax added to the purchase price, or of assuming its payment and accounting to the State Treasurer therefor after it had used the gasoline. It chose to do the latter and thus discharged a primary obligation of the wholesaler. This case is wholly unlike Helson's case. There the gasoline was purchased in Illinois for a ferry boat engaged in interstate commerce, and the tax involved was held to be a use tax imposed by a Kentucky statute on that part of the gas consumed by the ferry boat while within Kentucky. The court said, pages 249, 252:

"While a State has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of tax which is, in effect, a tax for the privilege of transacting such commerce. * * * The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel."

[fol. 141] So we conclude that appellant's attack upon the Wyoming statute cannot be sustained.

So far we have had in mind only gasoline purchased in Wyoming. The bill alleges that a part of the gasoline purchased and used by appellant in its planes in interstate commerce was purchased outside of Wyoming. The testimony on that subject is this: Appellant procures gasoline from both inside and outside the State of Wyoming; after it is purchased part of it is brought to Cheyenne and part to Rock Springs and stored in tanks for use at appellant's direction and subject to any use it wishes to make of it; there is one tank at Rock Springs and two at Cheyenne; the capacity of one of the tanks at Cheyenne is five thousand gallons and the other two thousand gallons; appellant sells some gasoline at Cheyenne and at Rock Springs; it displays a price sign at each place, stating the price of gasoline including the tax; other planes use both of these fields, and appellant uses gasoline locally at each field in trucks, automobiles, for testing purposes, and washing planes; there is no separate receptacle at either field in which appellant stores the gasoline which it sells to other airships, or buys outside Wyoming; it is all put into the storage tanks; there are gauges on the pumps, and a record was kept each time that gasoline was drawn from the tanks; the amount used locally by appellant, or sold, is in this way kept separately from the amount used by appellant in its interstate flights; it likewise measures the gasoline put into its planes for interstate commerce use. The record does not disclose how much gasoline during the times in question was purchased outside the state. On the facts stated it must have been mingled in the tanks with gasoline

purchased within the state. Appellant paid the tax on the gasoline used by it locally and on that sold to others without protested payments on all put in its tanks and used in interstate flights. Obviously it is impossible to ascertain how much gasoline that came from outside of Wyoming was thus used in its planes. Moreover, it does not appear whether gasoline purchased outside of Wyoming was delivered to appellant in Wyoming or outside the state. Judges McDermott and Pollock are agreed however that the pleadings and evidence are sufficient to require an injunction restraining collection of the tax on gasoline obtained by appellant on purchases made outside Wyoming and then brought into the state and used in its planes in interstate flights.

[fol. 142] The Wyoming Legislature at its general session in 1929 passed another act (Chapter 89) relating to the sale and delivery of gasoline. Section 1 of that act requires that every person, firm, corporation, association, co-partnership, or common carrier transporting, conveying or bringing gasoline into the state of Wyoming for retail or wholesale consumption or distribution within the state shall furnish to the State Treasurer not later than the 10th of each calendar month a verified statement showing the number of gallons of gasoline delivered within the State of Wyoming during the preceding month, giving the name of the person, firm, corporation, association, or co-partnership, to whom the same was delivered and the place of delivery. It is further provided that:

"Every wholesaler in gasoline and every person, firm, corporation, association, co-partnership, or common carrier transporting, conveying, or bringing gasoline into the State of Wyoming for retail or wholesale consumption or distribution within the State of Wyoming, as in this act defined, shall keep a record of all purchases, receipts, sales, and distribution of gasoline."

It further provided that such record shall at all times be subject to inspection by the State Treasurer. A penalty is provided for failure to make such report. No data relative to the amount of gasoline procured by appellant from outside the state required by this act is found in the record.

It is therefore impossible to even approximate the amount of gasoline coming from the outside during the time in question or the conditions of purchase and delivery. Conceding that appellant might make purchase of gasoline outside the state under given circumstances, bring that gasoline to Cheyenne and Rock Springs and use it in interstate flights and not be subject to account to the State Treasurer for the statutory tax on gasoline so used, it is the writer's opinion that the pleadings and facts in this case are too meager and indefinite to require and sustain a ruling and decree thereon.

The proviso to said section 3 of this act was put into that section at the special session of 1929 after the City of Cheyenne had entered into a written contract with appellant by which the latter obtained the right for a consideration to use the city's airplane field for twenty-five years commencing July 1, 1929, in landing, taking off, and there putting their planes in condition. The right was not [fol. 143] exclusive. Other planes could be given and were given similar rights. The city had made valuable improvements, as has appellant, at their respective costs. Appellant agreed to pay a specified amount in annual rentals, and additional costs of named future improvements and maintenance and management of the field were to be apportioned between them in a way stated in the contract. The city agreed that appellant should be entitled to the full use of the field during the lease on terms as favorable as might be granted by the city to other users, and that no charge should be exacted from appellant for any use which it might make additional to that specified in the contract, and that the city would impose no charge of any kind or character for materials or other products purchased or otherwise acquired by appellant for use on the premises leased. Later the city authorized a bond issue of $15,000.00 for enlargement of the field and for improvements such as grading, leveling, fencing, etc. Appellant contends that the proviso to section 3 impairs the obligations of the contract between the city and appellant in that it is in violation of Section 10, Article I of the United States Constitution. The proviso reads thus:

"provided that before making the distribution of funds provided for in Section 1 hereof the State Treasurer shall

pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field."

We are not impressed with this contention. It should be said it is made in response to statements of the trial judge that the tax on gasoline used at the field and turned over to the city pursuant to the proviso might be regarded as compensation to the city for the facilities it furnished and its outlay in maintenance and upkeep of the field. The trial judge relied on Sprout v. City of South Bend, 277 U. S. 163, and others like it. But it will be seen from what has been said we do not rest our conclusion on that ground. The obligations of the contract were in no way affected by the proviso. It provided a fund with which the city's obligations might be discharged, in part at least, but without it all of the tax would have been applied on the State's highways. Appellant was not injured by the change and cannot complain. Hooker v. Burr, 194 U. S. 417.

The District Court denied any relief by injunction and [fols. 144-146] dismissed the bill. In so far as the court denied the writ prayed for the case will be remanded with directions to issue the writ enjoining collection of the tax on all gasoline procured by appellant on purchases completed outside the State of Wyoming and then brought into that state and used in its planes in interstate commerce. In all other respects the order of dismissal of the District Court is affirmed. The costs on appeal will be divided, each party will be adjudged to pay the costs that it or they incurred.

It is so ordered.

In United States Circuit Court of Appeals

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

Decree—Oct. 20, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed in so far as it denies the writ of injunction prayed for; that this cause be and the same is hereby remanded to the said District Court with directions to issue the writ enjoining the collection of the tax on all gasoline procured by appellant on purchases completed outside the State of Wyoming and then brought into that state and used in the planes of appellant in interstate commerce; that in all other respects the decree of the said District Court be and the same is hereby affirmed; and that each party hereto pay the costs on appeal incurred by it or them.

Petition for rehearing, covering 3 pages, filed Nov. 10, 1932, omitted from this print. It was denied and nothing more by order of Nov. 25, 1932.

[fol. 147] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—Nov. 25, 1932

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

In United States Circuit Court of Appeals

Petition for Clarification of Decree—Filed Nov. 14, 1932

Counsel for Boeing Air Transport, Inc., appellant in the above entitled cause, respectfully make the following representations as grounds for the clarification of the decree indicated by the opinion filed in said cause on October 4, 1932.

The decision of this court reverses the decree entered by the court below, in part, and directs the issuance of a writ of injunction against the exaction of the Wyoming gasoline tax with respect to such gasoline as appellant purchases outside of the State and brings into the State for use in fueling its airplanes in interstate commerce. This part of the decision reads as follows:

"The District Court denied any relief by injunction and dismissed the bill. Insofar as the court denied the writ prayed for the case will be remanded with directions to issue the writ enjoining collection of the tax on all gasoline procured by appellant on purchases completed outside the State of Wyoming and then brought into that state and used in its planes in interstate commerce. In all other respects the order of dismissal of the District Court is affirmed."

Earlier in the opinion, it is said:

"The record does not disclose how much gasoline during the times in question was purchased outside the state. On the facts stated it must have been mingled in the tanks with gasoline purchased within the state. Appellant paid the [fol. 148] tax on the gasoline used by it locally and on that sold to others without protested payments on all put in its tanks and used in interstate flights. Obviously it is impossible to ascertain how much gasoline that came from outside of Wyoming was thus used in its planes. Moreover, it does not appear whether gasoline purchased outside of Wyoming was delivered to appellant in Wyoming or outside the state. Judges McDermott and Pollock are agreed, however, that the pleadings and evidence are sufficient to require an injunction restraining collection of the tax on gasoline obtained by appellant on purchases made outside Wyoming and then brought into the state and used in its planes in interstate flights."

We are in doubt as to whether or not the qualified reversal of the decree forecloses appellant's right to make proof and recover in the court below such taxes as were paid under protest upon gasoline purchased outside of the State of Wyoming and used in fueling its airplanes in interstate commerce.

It is true the record before the court does not show any segregation of the taxes paid under protest with respect to those paid on gasoline used in interstate commerce but purchased outside the State of Wyoming and those paid on gasoline within the State of Wyoming. It does not follow that such segregation cannot be made.

The court has assumed that during the entire period during which appellant made tax payments under protest, which tax payments appellant seeks to recover in this action, gasoline purchased within the State of Wyoming was mingled with gasoline purchased without the State of Wyoming. Although it does not appear in the record, in view of this assumption of the court, appellant feels that it is permissible to say that during the entire year 1930 all of the gasoline used or sold by appellant in Wyoming was purchased by the appellant outside of the State of Wyoming and thereafter imported by appellant into that state. Consequently, appellant is in a position to make definite proof that taxes in excess of $10,000 were paid by appellant on gasoline purchased by appellant outside of Wyoming and thereafter used by it in propelling its planes in interstate commerce.

The bill of complaint contains a prayer for other and [fol. 149] further relief. Under the principle announced in The Salton Sea Cases, 172 Fed. 792, certiorari denied 215 U. S. 604, this prayer is sufficient to support a decree awarding recovery of such taxes as were paid under protest with respect to gasoline purchased outside of the State of Wyoming and used by appellant in said state solely in fueling its airplanes in interstate commerce, which taxes this court now holds have been unlawfully exacted.

This court has granted to the appellant some relief—namely, an injunction against the collection of the tax on gasoline purchased outside of the State of Wyoming and used in said state in fueling appellant's airplanes in interstate commerce. Where injunctive relief is given by the appellate court, but the record before that court is not sufficient to determine the extent of the monetary relief which follow the injunctive relief, the proper practice is for the appellate court to remand the case to the trial court with instructions to take testimony for the purpose of determin-

ing the monetary award to which the successful party is entitled. This is the practice followed by the Supreme Court and we submit should be followed by this court in this case.

Dowagiac Mfg. Co. vs. Minnesota Moline Plow Co., 235 U. S. 641.
Hassal vs. Wilcox, 130 U. S. 493.

We accordingly ask that the decision of the court be clarified by specifically recognizing appellant's right to apply to the lower court for the recovery of such taxes as have been paid by it under protest with respect to gasoline purchased outside the State of Wyoming and used in fueling its airplanes in interstate commerce.

Respectfully submitted, John W. Lacey, Lacey & Loomis, Cheyenne, Wyoming. William M. Allen, Eugene C. Luccock, Todd, Holman & Sprague, Seattle, Washington, Attorneys for Appellant.

[fol. 150] Certificate of Counsel Required by Rule 25

The undersigned counsel for the appellant in the above entitled case hereby certify that the foregoing Petition for Clarification of the Decree of the court in the above entitled case is in their judgment well-founded and that the same is not interposed for delay.

William M. Allen, Eugene C. Luccock.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Clarification of Decree—Nov. 25, 1932

This cause came on to be heard on the petition of appellant for a clarification of the decree herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

In United States Circuit Court of Appeals

Motion for Stay of Mandate—Filed Dec. 5, 1932

Come now, the above named appellees, William H. Edelman, State Treasurer; Harry R. Weston, State Treasurer; The City of Cheyenne, a municipal corporation; and The City of Rock Springs, a municipal corporation, and move the court for a stay of mandate, or other process therein for a period of thirty (30) days in order to afford time to said appellees to prepare and present their application for an appeal of said cause to the Supreme Court of the United States.

[fol. 151] And appellees hereby certify that the foregoing motion for stay of mandate is presented in good faith and not for delay.

James A. Greenwood, Attorney General of Wyoming. Richard J. Jackson, Deputy Attorney General. George W. Ferguson, Asst. Attorney General. R. Dwight Wallace, Asst. Attorney General. Harry B. Henderson, Jr., by G. W. F., Attorney for the City of Cheyenne, Wyo. T. S. Taliaferro, Jr., by G. W. F., Attorney for the City of Rock Springs, Wyo.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Staying Mandate—Dec. 5, 1932

This cause came on to be heard on the motion of appellees for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 152] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 153] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 6, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,268. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 571. William H. Edelman, State Treasurer, Harry R. Weston, State Treasurer, The City of Cheyenne, et al., Petitioners, vs. Boeing Air Transport, Inc. Petition for a writ of certiorari and exhibit thereto. Filed December 27, 1932. File No. 37,268.

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Supreme Court of the United States

October Term, 1932

No......

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

vs.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

Petition for Writ of Certiorari

To the Honorable The Supreme Court of the United States:

The petition of William H. Edelman, State Treasurer; Harry R. Weston, State Treasurer; The City of Cheyenne, a municipal corporation; and The City of Rock Springs, a municipal corporation, respectfully shows to this Honorable Court:

A

Issues in the Case

1. On the 25th day of November, 1930, the respondent, Boeing Air Transport, Inc., a corporation of the State of Washington, filed in the United States District Court for the District of Wyoming, its Bill of Complaint against your petitioners, residents of the State of Wyoming, in which said Bill is sought relief permanently enjoining and restraining petitioners from collecting a license, or excise, tax of four cents per gallon on all gasoline held and owned by it in the State of Wyoming and used as fuel in propelling its airplanes in the transportation of passengers, express, and United States mail in interstate commerce.

2. The grounds for the relief sought are that the statutes of the State of Wyoming by virtue of which the tax had been collected from respondent are unconstitutional and in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, the commerce clause of the Federal Constitution, and that the tax is on the use of gasoline in interstate commerce, and thus an illegal interference with commerce among the states.

3. It is alleged that, by reason of the severe provisions and penalties of the statutes, irreparable loss and damages would result to respondent unless it should be granted equitable relief.

4. The alleged illegal tax had been paid by respondent, under protest, and the amount thereof is alleged to be in excess of $10,000.00, in the original and supplemental bills.

5. It is alleged that the gasoline of respondent on which the tax had been paid had been purchased by respondent partly within and partly outside the State of Wyoming.

6. The prayer of the Bill is in the usual terms for a permanent injunction, and for, to quote therefrom, "such other and further relief as the equity and justice of the case may require and which the Court may deem meet and just, whether specifically prayed for herein or not" (R. 1 and 44).

7. Petitioners answered, relying upon the legality of the statutes under which the tax had been collected, and asserting that the tax was not an illegal interference with, or regulation of, commerce among the states (R. 13, 17 and 30).

B

Opinion of the Court, and Final Decree

The matter of the issuance of an interlocutory injunction was not pressed, no such injunction was issued, and the action was tried by a single District Judge.

On trial on the merits, the findings of fact (R. 47), conclusions of law (R. 59), and decree (R. 60) of the District Court were in favor of petitioners, the injunction was denied, and the case was ordered dismissed at costs of respondent.

In due time the respondent appealed the case to the United States Circuit Court of Appeals for the Tenth Circuit, which Court, in its opinion, ordered the case remanded with directions to issue the writ enjoining collection of the tax on all

gasoline procured by respondent on purchases completed outside the State of Wyoming and then brought into the State and used in its planes in interstate commerce, but in all other respects affirmed the order of dismissal of the District Court. However, the Senior Circuit Judge was of the opinion that the pleadings and facts in the case were too meager and indefinite to require and sustain a ruling and decree thereon. The opinion of the Circuit Court of Appeals is reported in 61 Fed. (2d) 319, Advance Sheets No. 5, November 28, 1932 (R. 134). Decree was entered on October 20, 1932, remanding the cause to the Trial Court with directions to issue the writ of injunction enjoining petitioners from collecting the tax of four cents per gallon on all gasoline procured by respondent on purchases of gasoline completed outside the State of Wyoming and then brought into said State and used in propelling its airplanes in interstate commerce (R. 144).

In due time petitioners filed in the Circuit Court of Appeals their petition, and supporting brief, for a rehearing, which was denied by the Court on November 25, 1932 (R. 147).

In due time respondent filed in the Circuit Court of Appeals its petition for clarification of decree, which was denied by the Court on November 25, 1932 (R. 150).

C

Statement of Facts

And your petitioners respectfully show that the facts of the matter involved and on which the United States Circuit Court of Appeals for the Tenth Circuit rendered its decree directing the issuance of the writ of injunction against the collection of such tax by petitioners are, in the language of that Court, Page 322, the following:

> "Appellant procures gasoline from both inside and outside the State of Wyoming; after it is purchased part of it is brought to Cheyenne and part to Rock Springs and stored in tanks for use at appellant's direction and subject to any use it wishes to make of it; there is one tank at Rock Springs and two at Cheyenne; the capacity of one of the tanks at Cheyenne is five thousand gallons and the other two thousand gallons; appellant sells some gasoline at Cheyenne and at Rock Springs; it displays a price sign at each place, stating the price of gasoline including the

tax; other planes use both of these fields, and appellant uses gasoline locally at each field in trucks, automobiles, for testing purposes, and washing planes; there is no separate receptacle at either field in which appellant stores the gasoline which it sells to other airships, or buys outside Wyoming; it is all put into the storage tanks; there are gauges on the pumps, and a record was kept each time that gasoline was drawn from the tanks; the amount used locally by appellant, or sold, is in this way kept separately from the amount used by appellant in its interstate flights; it likewise measures the gasoline put into its planes for interstate commerce use. The record does not disclose how much gasoline during the times in question was purchased outside the state. On the facts stated it must have been mingled in the tanks with gasoline purchased within the state. Appellant paid the tax on the gasoline used by it locally and on that sold to others without protested payments on all put in its tanks and used in interstate flights. Obviously it is impossible to ascertain how much gasoline that came from outside of Wyoming was thus used in its planes. Moreover, it does not appear whether gasoline purchased outside of Wyoming was delivered to appellant in Wyoming or outside the State."

In addition, the undisputed testimony was that no excise, or license, tax had been paid on any of such gasoline procured by respondent on purchases outside the State of Wyoming (R. 104).

D

Reason Relied on for the Allowance of the Writ of Certiorari

Your petitioners are advised and so believe, that under the facts and the law of this case the decree of the United States Circuit Court of Appeals for the Tenth Circuit, reversing the decree of the District Court, wherein and to the extent that it remanded said cause to the Trial Court with directions to issue the writ of injunction enjoining petitioners from exacting and collecting the tax of four cents per gallon on all gasoline procured by respondent on purchases of gasoline completed outside the State of Wyoming and then brought into said State and used by it in propelling its airplanes in inter-

state commerce is erroneous and in violation of the rules, decisions and principles of law as laid down by this Honorable Court, and that this Honorable Court should require said case to be certified to it for its review and determination under and in accordance with the provisions of the Acts of Congress in such cases made and provided for the following reasons:

1. Because all gasoline procured and purchased by respondent outside the State of Wyoming, prior to its use and consumption by respondent in propelling its airplanes in the transportation of passengers, express, and United States mail in interstate commerce, attains a legal situs within the State of Wyoming for taxation, and the tax is legal and enforceable under the Constitution of the United States and the Constitution and statutes of the State of Wyoming.

2. Because the said tax on all such gasoline, as enforced and collected by petitioners in the State of Wyoming is a uniform, non-discriminatory license tax on all dealers and consumers of gasoline within the State, when it has attained a situs therein subject to the tax laws of the State, and is not a tax on the use of gasoline in interstate commerce.

3. Because the said tax on all such gasoline is not an interference with, or regulation of, interstate commerce among the states, and is not in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

4. Because the statutes of the State of Wyoming under attack provide for the exaction and collection of the said tax of four cents per gallon on all gasoline procured by respondent on purchases completed outside the State of Wyoming and used in propelling its airplanes in interstate commerce, and said statutes are valid and legal, and are not in violation of the Constitution of the United States.

E

Brief Accompanying Petition

Your petitioners append hereto their brief in support of this petition, in which each and all of the foregoing matters are more fully set forth and discussed.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 578, Boeing Air Transport, Inc., a corporation, Appellant vs. William H. Edelman, State Treasurer, Harry R. Weston, State Treasurer; The City of Cheyenne, a municipal corporation; and The City of Rock Springs, a municipal corporation, Appellees; and that the said decree, remanding the case with instructions to issue the writ of injunction, of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

WILLIAM H. EDELMAN,
State Treasurer.

HARRY R. WESTON,
State Treasurer.

THE CITY OF CHEYENNE,
A Municipal Corporation.

THE CITY OF ROCK SPRINGS,
A Municipal Corporation.

PETITIONERS.

By JAMES A. GREENWOOD,
Attorney General of the State of Wyoming.

Supreme Court of the United States

October Term, 1932

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

vs.

BOEING AIR TRANSPORT, INC., a Corporation,

Respondent.

Brief in Support of Petition for Writ of Certiorari

I.
The Opinions of the Courts Below

The opinion of the District Court is reported in 51 Fed. (2d) 130, Boeing Air Transport, Inc. vs. Edelman, State Treasurer, et al., and is at page 118 of the Record.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 61 Fed. (2d) 319, Boeing Air Transport, Inc. vs. Edelman, State Treasurer, et al., and is at page 134 of the Record.

II.
Jurisdiction

1. Paragraph (a) of Section 240, Act of February 13, 1925, Chapter 229, 43 Statutes at Large 936 (U. S. Code, Title 28, Section 347 (b)) is as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a Judgment or decree by

such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2. The date of the decree to be reviewed is October 20, 1932 (R. 144). The petition for rehearing was denied November 25, 1932 (R. 147).

3. The parties are citizens of different states and the matter in controversy exceeds in value the jurisdictional amount.

The action is in equity in which respondent, Boeing Air Transport, Inc., a corporation, seeks to permanently enjoin the State Treasurer of the State of Wyoming from collecting an excise tax of four cents per gallon on all gasoline held and owned by it in the State of Wyoming and used as fuel in propelling its airplanes in the business of interstate commerce, no tax having been previously paid thereon, a part of such gasoline having been purchased within the State of Wyoming and a part thereof having been purchased outside the State, but all thereof stored before its use in respondent's storage tanks at the cities of Cheyenne and Rock Springs in said State, and thereafter withdrawn from such tanks and consumed as fuel in propelling respondent's airplanes in the business of interstate commerce.

The tax is collected on or before the 15th of the months following its use.

The ground on which respondent relies for injunctive relief against the collection of the tax is that the statutes of the State of Wyoming, providing for the payment of such tax, are in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, and is an illegal interference with commerce among the states.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit sustains the tax as legal on all such gasoline procured by respondent on purchases within the State of Wyoming and holds the tax to be illegal on all such gasoline procured by respondent on purchases outside the State of Wyoming and then brought into said state and used in propelling its airplanes in interstate commerce.

The decree of the United States Circuit Court of Appeals for the Tenth Circuit remands the cause to the Lower Court, with directions to issue the writ of injunction prayed for, enjoining collection of the tax of four cents per gallon on all gas-

oline procured by respondent on purchases completed outside the State of Wyoming and then brought into said State and used in its airplanes in propelling them in interstate commerce.

4. The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Bradford Electric Light Co. v. Clapper, 284 U. S. 221;
Public Service Commission, et al. v. Batesville Telephone Co., 284 U. S. 6;
Smith v. Wilson, 273 U. S. 388, 391;
Magnum Import Co., Inc. v. Coty, 262 U. S. 159.

III.
Statement of the Case

Statement of the case and of the matters involved are sufficiently set forth under A and C in the Petition, in connection with the foregoing subdivision 3, therefore, for the sake of brevity these statements are not repeated at this point.

IV.
Specification of Error

The United States Circuit Court of Appeals for the Tenth Circuit erred in its decree in finding and holding therein and to the extent that it remanded said cause to the District Court with directions to issue the writ of injunction enjoining petitioners from exacting and collecting the tax of four cents per gallon on all gasoline procured by respondent on purchases of gasoline completed outside the State of Wyoming and then brought into said State and used by it in propelling its airplanes in interstate commerce for the following reasons:

(a) Because all gasoline procured and purchased by respondent outside the State of Wyoming, and used in propelling its airplanes in the transportation of passengers, express, and United States mail in interstate commerce, before its use and consumption was stored by respondent in its tanks within the State of Wyoming, and thus had attained a legal situs within the State of Wyoming for taxation, and the tax is legal and

enforceable under the Constitution of the United States and the Constitution and statutes of the State of Wyoming.

(b) Because the said tax on all such gasoline, as enforced and collected by petitioners in the State of Wyoming is a uniform, non-discriminatory license tax on all dealers and consumers of gasoline within the State, when it has attained a situs therein subject to the tax laws of the State, and is not a tax on the use of gasoline in interstate commerce.

(c) Because the said tax on all such gasoline is not an interference with, or regulation of, interstate commerce among the states, and is not in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States.

(d) Because the statutes of the State of Wyoming provide for the exaction and collection of the said tax of four cents per gallon on all gasoline procured by respondent on purchases completed outside the State of Wyoming and used in propelling its airplanes in interstate commerce, and said statutes are valid and legal, and are not in violation of the Constitution of the United States.

V

Argument

A

THE STATUTES OF WYOMING LEVY A LICENSE TAX OF FOUR CENTS PER GALLON ON ALL GASOLINE USED OR SOLD FOR DOMESTIC CONSUMPTION, AFTER ITS STORAGE IN THE STATE, AND DO NOT TAX THE USE OF GASOLINE AS A MEANS BY WHICH INTERSTATE COMMERCE IS EFFECTED.

The statutes of the State of Wyoming under which the petitioner, State Treasurer, is collecting and enforcing the tax of four cents per gallon on the gasoline of respondent, are found in Article 11 of Chapter 115, Wyoming Revised Statutes, 1931, page 1862, and are set forth in full as an appendix to this brief.

We direct particular attention to the following provisions thereof:

> "115-1102. Amount of tax. A license tax of four cents per gallon is hereby levied on all gasoline used or sold in this state for domestic consumption to be collected as hereinafter set forth."

> "115-1103. Payment of tax. * * * Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, render a true statement to the state treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; * * *"

The statute of 1923 taxed gasoline sold for domestic consumption. The word "used" was added in 1925 and the two words, "used" and "sold", have uniformly appeared thereafter.

As there has been no attempt to construe the statute as permitting the taxing of gasoline placed in appellant's planes in an adjoining state and used or consumed while passing through Wyoming, but solely as permitting the taxation of gasoline stored by appellant in its tanks and thereafter placed in its planes within the state, under well established principles of construction followed by this Court, this construction will be adopted and followed.

As no attempt is being made by the taxing authorities to tax gasoline placed in planes or vehicles of transportation without the state, it may be assumed that the word "used" was added to the statute for the purpose of making it uniform and to prevent its evasion rather than for the purpose of adding new sources of revenue. No doubt, the intention of the legislators of 1923 was to levy a tax on all gasoline which had attained a fixed situs within the state for the purpose of domestic consumption, by levying the same on all gasoline sold therein, but knowing the possibility of its evasion as well as desiring to place all domestic consumers on an absolutely equal basis, the word "used" was added by the succeeding legislature, and is to be construed as synonomous with sale.

We thus are dealing with a statute, as interpreted and construed, which levies a tax of four cents per gallon on all gasoline, which has acquired a fixed situs within the State of Wyoming and is thereafter and within the State sold to a domestic consumer or placed by a domestic consumer in his machine for use therein. A single tax on all gasoline for domestic consumption, whether sold or used, not a tax on the sale and another on the use.

B

INSTRUMENTALITIES USED IN INTERSTATE COMMERCE, UNDER THE DECISIONS OF THIS COURT, ARE SUBJECT TO EITHER A PROPERTY, OR LICENSE TAX BY A STATE, THE SAME AS OTHER PROPERTY, ALL HAVING A SITUS THEREIN.

"It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce." Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 445.

"While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce." Helson v. Commonwealth of Kentucky, 279 U. S. 245, 249.

"The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. Gregg Dyeing Co. v. Query, Supreme Court of South Carolina, decided April 13, 1931, S. C. , 164 S. E. 588. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold, its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce. 'It is elementary,' said the Court in New Jersey Bell Teleph. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 346, 74 L. Ed. 463, 467, 50 S. Ct. 111, 'that a State may tax property used to carry on interstate commerce.' Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. Superior Oil Co. v. Mississippi, 280 U. S. 390, 395, 74 L. Ed. 504, 507, 50 S. Ct. 169. Undoubtedly, purchases of goods within a State may form part of transactions in interstate com-

merce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected." Eastern Air Transport, Inc. v. South Carolina Tax Commission, et al., 285 U. S. 147, 152, 153.

C

PROPERTY ACQUIRED BY PURCHASE IN ANOTHER STATE THAN THAT IN WHICH IT IS USED, WHENEVER IT BECOMES A PART OF THE GENERAL MASS OF THE PROPERTY OF THE STATE OF ITS USE, BY DELIVERY AND STORAGE THEREIN, BECOMES SUBJECT TO THE TAXATION LAWS OF THE STATE OF ITS USE AND SITUS, REGARDLESS OF THE CLASS OF THE TAX OR THE USE THEREAFTER OF THE PROPERTY.

The tax was sustained by the Circuit Court of Appeals on all gasoline of respondent procured by it on purchases within the State.

Gasoline of respondent procured on purchases outside the State, having thereafter been stored by it in its storage tanks within the State, was thereafter withdrawn, as and when needed, placed in its airplanes, and used and consumed in propelling its airplanes in interstate commerce. We think a license tax on all such gasoline is equally not open to attack as an interference with commerce among the states.

We can conceive of no difference between the two, so far as respondent's objection thereto is concerned. Neither is a tax

on the use of gasoline in interstate commerce, nor a tax "exacted as the price of the privilege of using an instrumentality of interstate commerce."

Whenever the subjects of interstate commerce cease longer to be in transportation between the states, that is, as repeatedly said by this Court, "come to rest" within a state, the subjects of such commerce then become a part of the mass of the property of that state, subject to its laws, and attain a situs, subject to taxation within that state.

> "That with respect to such substances when they have passed out of interstate commerce and have come to rest within the state and become a part of the general mass of property or have become the subject of domestic commerce, the state may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own constitution." Texas Co. v. Brown, 258 U. S. 466, 475, 66 L. Ed. 721.
>
> "Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and whether in the original package or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject." Sonneborn Brothers v. Keeling, et al., 262 U. S. 506, 508, 509, 67 L. Ed. 1095.
>
> "Interstate transportation having ended, the taxing power of the state in respect of the commodity which was the subject of such transportation, may, so far as the commerce clause of the federal Constitution is concerned, be exerted in any way which the state's constitution and laws permit, provided, of course, it does not discriminate against the commodity because of its origin in another state." Hart Refineries v. Harmon, 278 U. S. 499, 501, 502, 73 L. Ed. 475.

As controlling and upholding the legality of the tax, we cite Gregg Dyeing Co. v. Query, et al., 286 U. S. 472 (Preliminary Print No. 3), 76 L. Ed. 852, opinion by Mr. Chief Justice Hughes, and affirming the opinion of the Supreme Court of S. C. as reported in 164 S. E. 588. At pages 478 and 479 it is said:

> "We may lay aside, as not here involved, any question relating to importations from foreign countries. As to interstate commerce, the questions are (1) whether the Act as applied by the state court imposes a direct burden upon that commerce, and (2) whether, although the subject of the tax would otherwise be within the power of the State, the tax is invalid because it creates an unconstitutional discrimination against transactions in interstate commerce.
>
> "As to the first question, we are not concerned with what the tax is called but with what the statute does. It imposes an exaction with respect to gasoline purchased in other States and brought into South Carolina and there placed by appellants in storage for future use within the State. By the terms of the Act, as construed by the state court and applied to these appellants, interstate commerce in relation to the subject of the tax has ended. The gasoline has come to rest within the State, having been placed in appellants' storage tanks and added to appellants' property kept for local purposes. In such circumstances the State has the authority 'to tax the products or their storage or sale.' Texas Company v. Brown, 258 U. S. 466, 478; Sonneborn Bros. v. Cureton, 262 U. S. 506, 519, 520; Hart Refineries v. Harmon, 278 U. S. 499, 501, 502. Not only may local sales of gasoline thus brought into the State be taxed, but its use as well. This was specifically determined in Bowman v. Continental Oil Co., 256 U. S. 642, 648, 649. See Hart Refineries v. Harmon, supra; Breece Lumber Co. v. Asplund, 283 U. S. 788. There is an exception in the case of a tax directly on use in interstate commerce, as on use in interstate transportation. Helson v. Kentucky, 279 U. S. 245, 252; Eastern Air Transport v. South Carolina Tax Comm., 285 U. S. 147. In view of these well-established principles, we find no ground for concluding that the State could not impose the tax with respect to the gasoline of appellants which was kept with-

> in the State for use in their local enterprises. As the Court said, in Hart Refineries v. Harmon, supra, interstate transportation having ended, the taxing power of the state in respect to the commodity may, so far as the commerce clause of the Federal Constitution is concerned, 'be exerted in any way which the State's constitution and laws permit'. This, of course, is on the assumption that the tax does not discriminate against the commodity because of its origin in another State."

Bearing on the legality of the tax, the only difference between the two statutes, as construed, is that the South Carolina statute "does not propose to tax any gasoline until twenty-four hours after it has lost its interstate character."

That the length of time the property has been stored, or has been "at rest", within the state is not the controlling feature, we quote from an importation case, as in point on the question of the length of time the property must be "at rest" before it is subject to the taxing power of the state.

> "Without further reference to authorities we state our conclusion to be that within the decision in Brown v. Maryland the boxes, cases or bales in which plaintiffs' goods were shipped were the original packages, and the goods imported by them lost their distinctive character as imports and became a part of the general mass of the property of Louisiana, and subject to local taxation as other property in that state, the moment the boxes, cases or bales in which they were shipped reached their destination for use or trade and were opened and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States." May v. New Orleans, 178 U. S. 496, 509, 510, 44 L. Ed. 1165.

In Foster & Creighton Co. v. Graham, et al., 154 Tenn. 412, 285 S. W. 570, 47 A. L. R. 971, a tax on gasoline received in interstate commerce and stored and used was sustained, although the statute contains no provision fixing any definite length of time for loss of its interstate character.

In Burke v. Bass, et al., 242 N. W. 606, decided by the Supreme Court of Nebraska May 20, 1932, a tax on gasoline was sustained, under the same conditions as in the Tennessee case.

In Breece Lumber Co., et at. v. Mirabal, 34 N. M. 643, 287 Pac. 699, a tax on gasoline was sustained, under the same conditions as in the Tennessee and Nebraska cases. After the substitution of Asplund as defendant, as reported in 283 U. S. 788, the decree of the state court was affirmed without opinion.

> "It is not the intent with which the gasoline is to be used that determines the liability of the taxes, but it is the status of the gasoline at the time." American Airways, Inc. v. Wallace, et al., 57 Fed. (2d) 877, 880.
>
> See, also, Brown v. Houston, 114 U. S. 622, 632-634; American Steel & Wire Co. v. Speed, 192 U. S. 500, 520; Bowman v. Continental Oil Co., 256 U. S. 642, 648-649; Jerome H. Sheip Co. v. Amos, 130 So. 699 (Fla.).

While in the Helson case, supra, the tax, levied by the State of Kentucky on gasoline purchased in Illinois, was declared illegal, the gasoline never at any time came to rest in Kentucky and never became part of the mass of the property of that state. Obviously that case is distinguishable from the instant case, both, on principle, and, as clearly shown by the Gregg Dyeing Co. case, supra, and other cases cited herein.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the State of Wyoming may proceed with the enforcement of its statutes and the collection of the license tax on gasoline, as provided therein, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Appendix

Chapter 115, Article 11, Wyoming Revised Statutes, 1931, page 1862.

GASOLINE TAX

115-1101. Definitions. The words and phrases used in this article shall be construed for the purpose thereof as follows:

(1) "Wholesaler" is hereby defined as any person, firm or corporation who imports or causes to be imported gasoline, as herein defined, for sale in the state of Wyoming to the jobber or consumer, or to the persons, firms, corporations or associations of persons, who, in turn, sell to the jobber or consumer; the term "wholesaler" is further defined to mean any person, firm or corporation who produces, refines, manufactures, blends or compounds gasoline in the state of Wyoming for use, sale or distribution in this state;

(2) "Gasoline" is hereby defined as the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of gasoline, and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles, except the product commonly known as kerosene. [L. '23, c. 73, § 1.

115-1102 Amount of tax. A license tax of four cents per gallon is hereby levied on all gasoline used or sold in this state for domestic consumption to be collected as hereinafter set forth. [L. '29, c. 139, §1, amending L. '27, c. 70, §1; L. '25, c. 89, §1; L. '23, c. 73, §2.

115-1103. Payment of tax. Each and every wholesaler as defined in this article, who is now or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this state in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month, render to the state treasurer a statement of all gasoline sold or used by them in the state of Wyoming during the preceding calendar month, and pay to the state treasurer at the same time, the license tax of four cents per gallon on all such gasoline. Said statement to the state treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner, or managing agent, in the case of an individ-

ual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers, in the case of a domestic corporation. Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, render a true statement to the state treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided, that before making the distribution of funds provided for in § 115-1108, the state treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal or county air field to the city, town or county where such air field is located, to be used for the maintenance and improvement of such air field. [L. '31, c. 23, § 1, amending L. '29, Spec. Sess., c. 14, § 1; L. '23, c. 73, § 3.

115-1104. Penalty for violation. Any party violating any of the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars and not more than two hundred dollars, or to imprisonment for one month, or to both such fine and imprisonment. [L '29, Spec. Sess., c. 14, § 2.

115-1105. Report to state treasurer. Every person, firm, corporation, association, co-partnership or common carrier, transporting, conveying or bringing gasoline into the state of Wyoming, for retail or wholesale consumption or distribution within the state of Wyoming, shall furnish to the state treasurer of the state of Wyoming, upon a form to be provided by the treasurer, not later than the 10th day of each calendar month, a verified statement showing the gallons of gasoline delivered into the state of Wyoming during the month preceding such report, giving the name of the person, firm, corporation, association or co-partnership to whom the same was delivered and the place of delivery. [L. '29, c. 89, § 1.

115-1106. Penalty for failure to report. Failure to furnish such reports to the state treasurer of the state of Wyoming as provided by this article within twenty days after the date when same is due shall be deemed a misdemeanor and

upon conviction, be punishable by a fine of not less than $25.00 nor more than $100.00 for each separate offense. [L. '29, c. 89, § 3.

115-1107. Record of gasoline brought into state. Every wholesaler in gasoline and every person, firm, corporation, co-partnership, or common carrier transporting, conveying or bringing gasoline into the state of Wyoming for retail or wholesale consumption or distribution within the state of Wyoming, as in this article defined shall keep a record of all purchases, receipts, sales and distribution of gasoline; such records shall at all times be subject to inspection by the state treasurer or his deputies or such other officers duly authorized by the state treasurer. [L. '29, c. 89, § 2, amending L. '23, c. 73, § 4.

115-1108. Distribution of receipts from tax. Seventy-five per centum of all funds received by the state treasurer from the gasoline license tax provided for in this article, shall be placed to the credit of the state highway fund and shall be used: first, for the payment of interest upon any hereafter issued state highway bonds as such interest may become due; and, second, for maintenance, improvement and asphalt oil surfacing for state highways; provided, that funds for the said second purpose of maintenance, improvement and asphalt oil surfacing for state highways, shall be apportioned between the several counties of the state in proportion to the number of miles of designated state highways therein. The remaining twenty-five per centum shall be apportioned by the state treasurer between the several counties of the state, thirty per centum in the ratio which the area of the county bears to the total area of the state, excepting areas included in national parks; thirty per centum in the ratio which the rural population of the county bears to the total rural population of the state according to the last available state or federal census, and forty per centum in the ratio which the assessed valuation of the county bears to the last total assessed valuation of the state, and on July 15th, and quarterly thereafter he shall pay same to the respective county treasurers who shall credit the same to the county road fund; provided, that seventy-five per centum of all refunds or other expenses paid by the state treasurer according to law, shall be charged to the state highway fund, and twenty-five per centum to the fund to be appor-

tioned among the counties. [L. '31, c. 73, § 167, amending L. '29, Spec. Sess., c. 11, § 1; L. '23, c. 73, § 5.

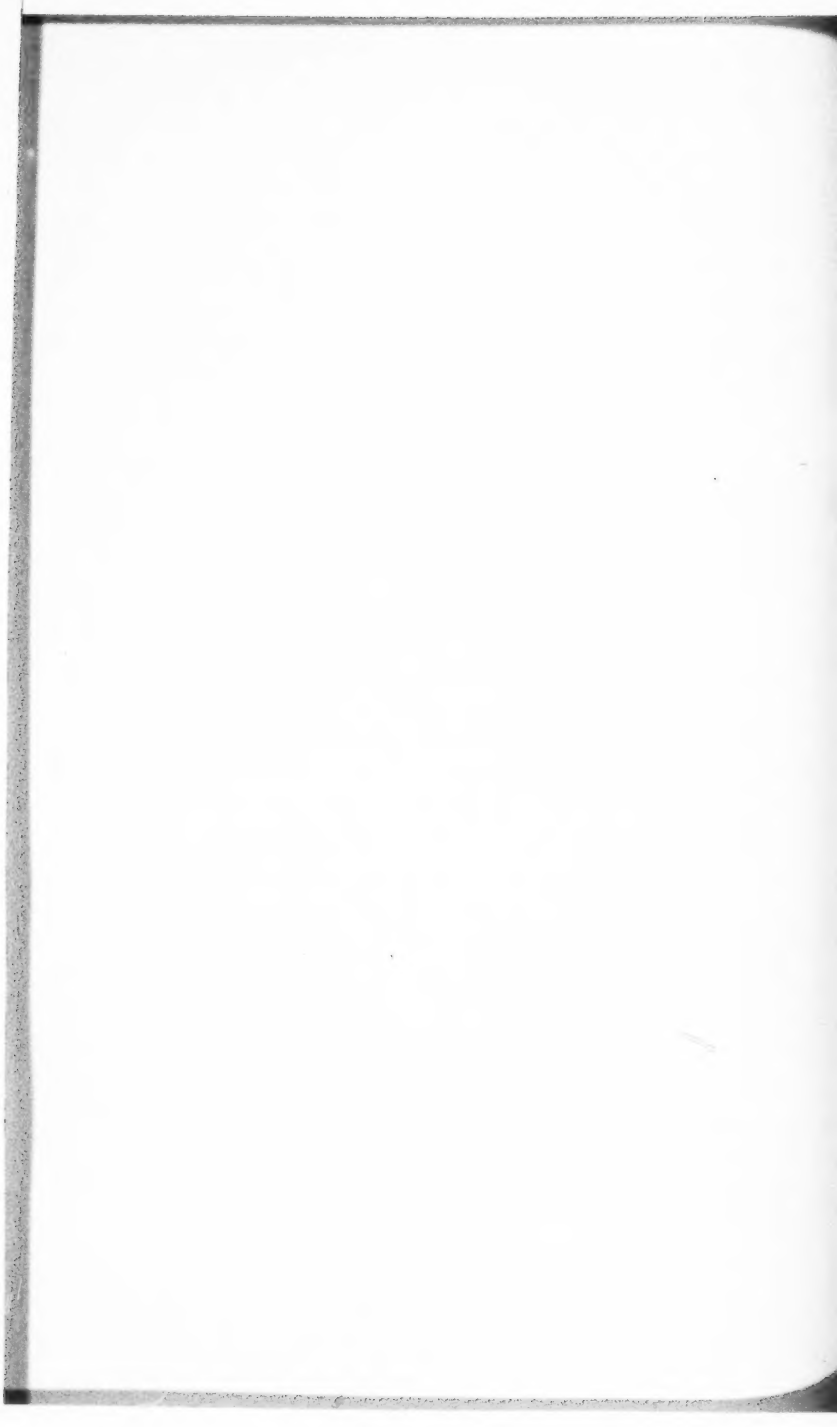
115-1109. Display of sign. Every person, firm or corporation, who shall have in his possession, for the purpose of sale, or who shall sell or offer for sale to the retail trade, gasoline for use in motor vehicles, shall display in a conspicuous place a sign stating the price at which said gasoline should be sold and the amount of tax thereon. And any person, firm or corporation who shall neglect to so give the notice provided for in this article, or who shall violate any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than one hundred dollars ($100.00), or by imprisonment in a county jail for not less than ten days nor more than thirty days, or by both such fine and imprisonment. [L. '27, c. 70, § 4, amending L. '25, c. 89, § 4.

115-1110. Violation—Penalty. It shall be unlawful for any such wholesaler, as herein defined, of gasoline, or other products subject to said tax, to sell or offer the same for sale in the state of Wyoming while delinquent in the payment of the whole or any part of the tax due and payable hereunder, and any such wholesaler who fails or refuses to pay the tax hereinbefore provided for at the time the same becomes due, shall be liable for double the amount thereof to be recovered in a suit instituted by and in the name of the state of Wyoming in any court of competent jurisdiction, in which suit, upon application made by the state of Wyoming, a writ of injunction may be issued against the defendant or defendants without requiring any bond, enjoining and restraining them from selling or attempting to sell or offer for sale in the state of Wyoming any gasoline or other products subject to said tax, while the whole or any part of the tax due from such defendant remains unpaid, and in such suit the court may, upon application made by the state of Wyoming, appoint a receiver of the property and business of the defendant, for the purpose of impounding the same as security for the payment of said delinquent tax and any judgment recovered in said suit. The state treasurer, or his assistant or deputies, shall have the right, during business hours to inspect the books and records of any party subject to said tax, for the purpose of determining the amount of tax due and payable and whether the same has been paid. Any party

violating any of the provisions of this article shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars ($50.00) and not more than two hundred dollars ($200.00) or to imprisonment for one month, or to both such fine and imprisonment. The remedies herein provided shall be cumulative. [L. '29, c. 139, § 4, amending L. '23, c. 73, § 6.

115-1111. Exception. Said gasoline license tax shall not be imposed on gasoline when exported or sold for exportation from the state of Wyoming to any other state or nation. [L. '23, c. 73, § 8.

115-1112. Prosecution. Upon request of the state treasurer, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction, any and all necessary action or actions at law, to enforce the provisions of this article. [L. '23, c. 73, § 9.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 571

WILLIAM H. EDELMAN, State Treasurer;
HARRY R. WESTON, State Treasurer;
THE CITY OF CHEYENNE, ET AL.,
Petitioners
vs.
BOEING AIR TRANSPORT, INC.

Supplement to Brief in Support of Petition

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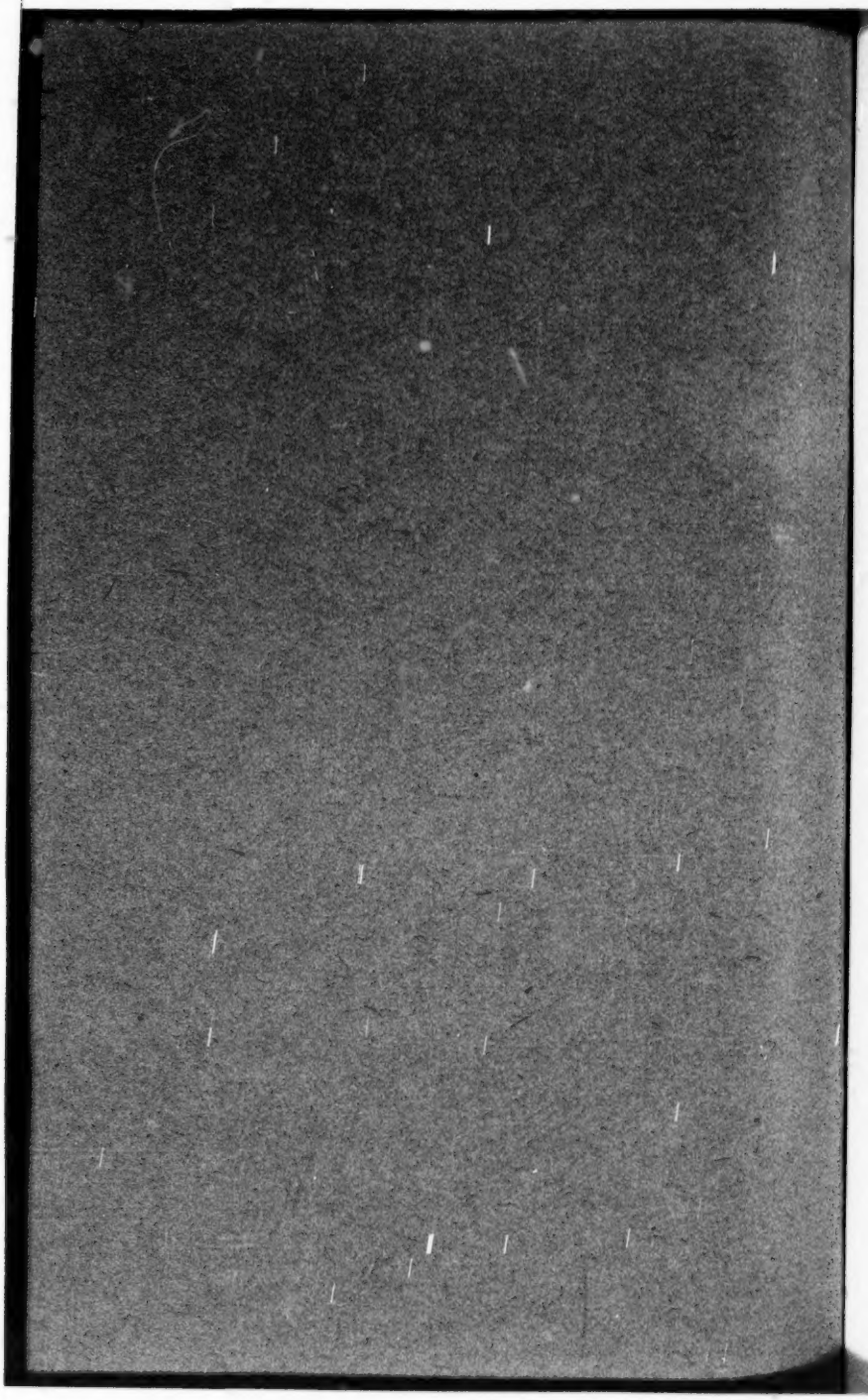

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ARGUMENT 1

THE STATUTES OF WYOMING LEVY A LICENSE TAX OF FOUR CENTS PER GALLON ON ALL GASOLINE USED OR SOLD FOR DOMESTIC CONSUMPTION, AFTER ITS STORAGE IN THE STATE, AND DO NOT TAX THE USE OF GASOLINE AS A MEANS BY WHICH INTERSTATE COMMERCE IS EFFECTED 2

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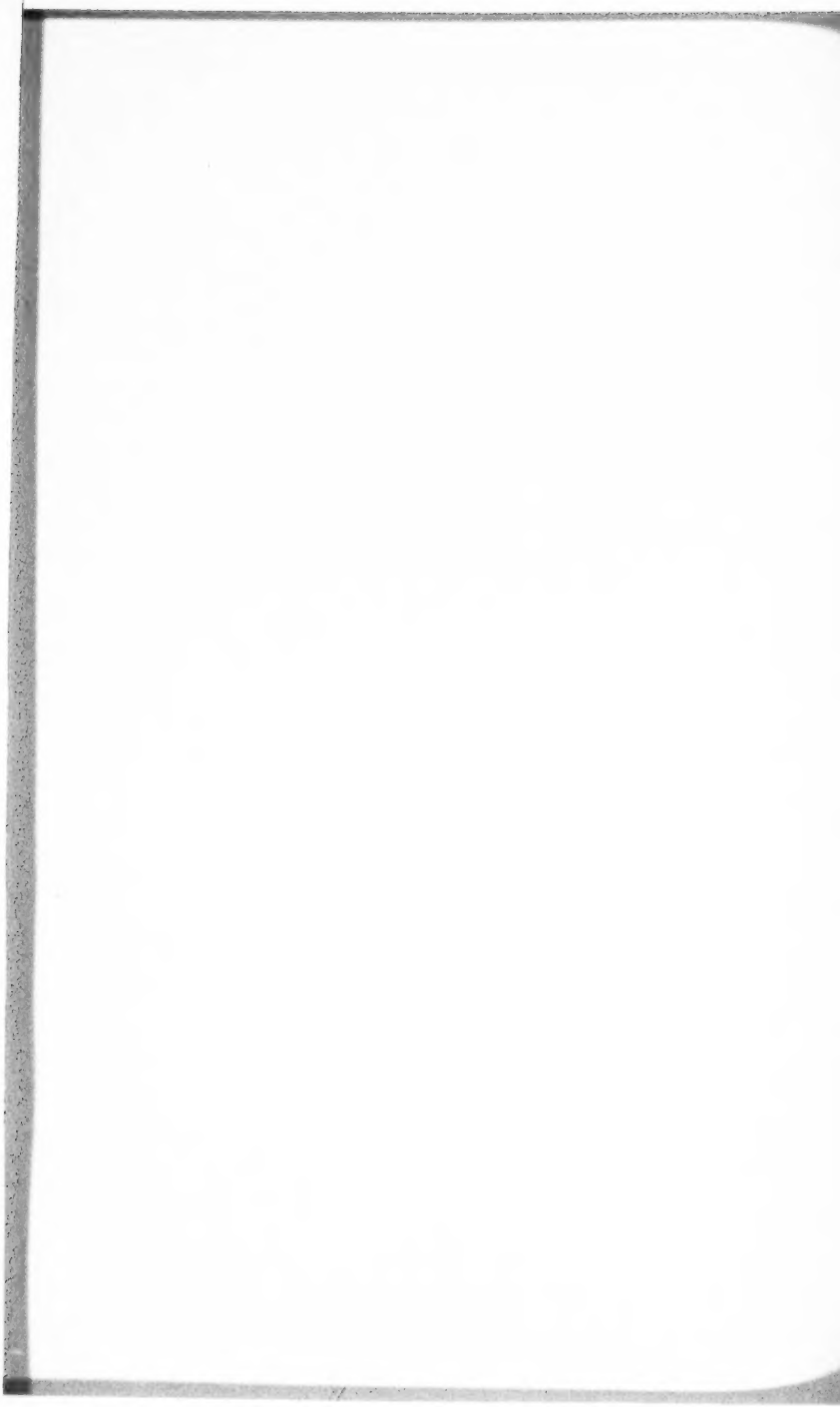

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 571

WILLIAM H. EDELMAN, State Treasurer;
HARRY R. WESTON, State Treasurer;
THE CITY OF CHEYENNE, ET AL.,
Petitioners
vs.
BOEING AIR TRANSPORT, INC.

Supplement to Brief in Support of Petition

Correction

There is an error in the printed decision of the Circuit Court of Appeals, quoted in the petition for writ of certiorari. In line 17, page 4, following "without", there should be inserted, "protest, but". The sentence should read, "Appellant paid the tax on the gasoline used by it locally and on that sold to others without protest, but protested payments on all put in its tanks and used in interstate flights". (R. 140)

Argument

Opinion of the District Court is at page 119 of the Record.

Opinion of the Circuit Court of Appeals is at page 132 of the Record.

Decree of the Circuit Court of Appeals is at page 142 of the Record.

We think that the decision of this Court announced February 6, 1933, in No. 176, The Nashville, Chattanooga & St. Louis Railway v. Roy C. Wallace, Comptroller, et al., establishes the correctness of propositions B and C of the Argument of petitioners' brief in support of the petition, and the legality of an excise tax on gasoline consumed in interstate commerce, under the facts disclosed by the Record in the case at bar. Indeed, although not controlling, there is one stronger

fact in the instant case. Respondent sold a portion of the gasoline stored in its tanks and from which it withdrew the gasoline on which it is seeking to enjoin the collection of the tax and contracted with the City of Rock Springs for the right of such sale.

Proposition "A" of petitioners' brief is as follows:

"THE STATUTES OF WYOMING LEVY A LICENSE TAX OF FOUR CENTS PER GALLON ON ALL GASOLINE USED OR SOLD FOR DOMESTIC CONSUMPTION, AFTER ITS STORAGE IN THE STATE, AND DO NOT TAX THE USE OF GASOLINE AS A MEANS BY WHICH INTERSTATE COMMERCE IS EFFECTED."

The Wyoming statutes are given in full as an appendix to brief of petitioners in support of their petition, beginning at page 19.

The Circuit Court of Appeals said, "We think it plain that the original act and as amended imposes the tax only against wholesalers as that term is defined in the original act". (R. 135)

That the Wyoming gasoline tax primarily is intended to be collected from and paid by the wholesaler, as defined in the law, we think is true.

Chapter 14 of the Special Session of 1929 amended Section 2 of Chapter 139, Session Laws of 1929 (Section 115-1103, W. R. S., 1931), by adding at the end thereof the following:

> "Every person, firm or corporation, who shall use any gasoline in this state upon which the said tax has not been paid by any wholesaler in this state, shall, on or before the 15th day of each calendar month, render a true statement to the state treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided, that before making the distribution of funds provided for in Section 115-1108, the state treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal or county air field to the city, town or county where such air field is located, to be used for the maintenance and improvement of such air field."

Thus this amendment provides for three distinct things:

(1) Levies the tax on "Every person, firm or corporation", coming under its provisions, and not defined as a "wholesaler";

(2) Provides for the payment of the tax; and,

(3) Provides that the tax on "all gasoline used at any municipal * * * air field" shall be paid over to the city where located "for the maintenance and improvement of such air field".

The only other difference between the Wallace case and the case at bar is as to the wording of the state statutes. The Tennessee statute imposes the tax on "storing any of the products mentioned in this act, and distributing the same, or allowing the same to be withdrawn from storage, whether such withdrawal be for sale or other use". By the amendment the Wyoming law levies the tax "on gasoline used at any municipal or county air field", and by the preceding Section "on all gasoline used or sold in this state for domestic consumption".

In the Wallace case it was decided that a tax on gasoline purchased outside the state of Tennessee and stored within the state, withdrawn and used in generating motive power in interstate commerce, was a valid tax, under the statute of that state.

Therefore the only question in the case at bar is, Is the tax valid under a statute levying the same "on all gasoline used * * * in this state for domestic consumption", as provided in Section 115-1102, and as provided in the following Section, as amended, "on gasoline used at any municipal * * * air field"?

We understand that it is the taxation of the use of gasoline in the sense of its consumption as a fuel that is forbidden in the Helson case, for, referring thereto, it is said in the Wallace case that the tax forbidden therein was "levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce".

The word "used" admits of different meanings, such as sold, consumed in generating motive power, and stored and withdrawn.

"A sale is one of the uses to which property can be subjected. As relating to one's possession, the word 'use' includes every purpose for which such property may be used", Gulf Refining Co. v. Smith, et al., 164 Ga. 811, 814, 139 S. E. 716, 718.

Gasoline used in the state for domestic consumption, used at an air field, or used for domestic consumption at an air field, is not gasoline used in generating motive power. Since the law qualifies use for domestic consumption, this is the use that is the basis of the tax, and not that of generating motive power in interstate commerce.

Respondent stores and withdraws the gasoline on which petitioners collect the tax. Respondent uses the gasoline at the municipal air field, that is, it stores and withdraws the gasoline at the air field. Petitioners are not taxing the use of gasoline in generating motive power, after it is withdrawn from respondent's storage tanks. If they were, they would tax all gasoline so used from the time respondent's airplanes crossed the state line, as was attempted in the Helson case.

However, we do not think that the mere wording of the statute is controlling, for it has been repeatedly held by this Court, in passing on the legality of a tax, that it regards the substance and not the form.

"In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State." Gregg Dyeing Co. v. Query, 286 U. S. 472, 476. And at page 478 it is said, "As to the first question (imposing a direct burden upon interstate commerce), we are not concerned with what the tax is called, but with what the statute does."

"The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents;" Dawson v. Kentucky Distilleries, 255 U. S. 288, 292.

"On the other hand, if what is done is to reach the property and not to tax the gross earnings, the latter being taken merely as an index or measure of the value of the former, it well may be that the objection urged against the tax is untenable; for, as this court has said, 'by whatever name the tax or taxes may be called that are fixed by reference to the value of the property, if they are not imposed because of its use in interstate or foreign commerce, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed,

they are not open to attack' as restraining or burdening such commerce." Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453.

"And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized." Kansas City Ry. v. Kansas, 240 U. S. 227, 231.

"The difficulty has been, and is, to distinguish between legitimate attempts to exert the taxing power of the State and those laws which, though in the guise of taxation, impose real burdens upon interstate commerce as such." U. S. Express Co. v. Minnesota, 223 U. S. 335, 344.

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." Galveston, Harrisbury etc. Ry. Co. v. Texas, 210 U. S. 217, 227.

"Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy." Nicol v. Ames, 173 U. S. 509, 516.

The most unfavorable view that can be taken of the Wyoming law is that it provides for the payment of a non-discriminatory license tax of four cents per gallon on all gasoline which has become a part of the general mass of the property of the State. Without ourselves presuming to define an excise tax, it has been frequently referred to by this Court as an indirect tax. We think that one of its characteristics is that only those are required to pay it who voluntarily acquire or use the article on which it is levied. That is, it is a tax levied on certain articles, such as tobacco, intoxicating liquors and gasoline. As was said by this Court in Patton v. Brady, Executrix, 184 U. S. 608, 618-619:

"It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and intended use."

The District Judge sustained the tax as compensation to the cities for the facilities furnished and their outlay in maintenance and upkeep of the air fields. We do not deem it necessary to cite additional authorities to those relied on by him. He having found the compensation reasonable, we think this finding will be accepted by this Court. (R. 126-131)

Conclusion

It is uniformly held that the user of the article pays the excise tax. In enforcing the payment of the gasoline tax by respondent, petitioners are collecting a uniform, non-discriminatory tax on all users of gasoline in the State, and on which no tax has been paid. To declare the tax invalid, as administered against respondent, is to place respondent in a preferred class as a user of gasoline in generating motive power in interstate commerce.

We respectfully submit that the decree of the United States Circuit Court of Appeals for the Tenth Circuit, remanding this cause with instructions to issue the injunction, should be reversed, with directions to affirm in all respects the decree of dismissal rendered by the United States District Court for the District of Wyoming.

Respectfully submitted,

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No. .....

Supreme Court of the United States

October Term, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

October Term, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.
OPINIONS OF THE COURT BELOW.

The opinion of the United States District Court is reported in 51 Fed. (2) 130 and is at p. 118 of the Record.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 61 Fed. (2) 319 and is at p. 134 of the Record.

II.

JURISDICTION.

By reason of Section 240 (a), Act of February 13th, 1925, ch. 229; 43 Statutes at Large 936 (U. S. C., Title 28, Sec. 347 a) this Court has jurisdiction to grant the petition for writ of *certiorari*. However, as hereinafter pointed out, the reasons usually required by this Court for the issuance of a writ of *certiorari* are entirely lacking in this case (Rule 38 of this Court).

III

STATEMENT OF THE CASE.

As a statement of the case petitioners content themselves with a quotation from the opinion of the Circuit Court of Appeals. The summary of facts in this quotation in some material respects includes deductions by the writer of the opinion which are not supported by the Record and are not concurred in by the other members of the Court. Respondent therefore deems it advisable to make a complete statement of the case as disclosed by the Record.

In this case respondent sought to enjoin the State Treasurer of Wyoming from exacting payment of a tax imposed under the laws of Wyoming with respect to gasoline used by the airplanes of respondent while engaged in interstate commerce and to re-

cover certain sums paid as taxes, under protest (R. 11-12, 6, 45).

Respondent is a corporation organized under the laws of the State of Washington and qualified to do business in the State of Wyoming (R. 2, 61). The petitioner William H. Edelman was State Treasurer of Wyoming at the time of the institution of the action (R. 31). The petitioner Harry R. Weston was State Treasurer of Wyoming at the time the case came on for trial in the District Court (R. 47). Both Edelman and Weston are residents of the State of Wyoming (R. 47). The petitioners, the City of Cheyenne and the City of Rock Springs, are municipal corporations organized under the laws of the State of Wyoming and, as such, are residents of that State (R. 47, 48).

Respondent is engaged in the transportation by air of mail, passengers and express, between the cities of Chicago, Illinois and San Francisco, California (R. 89). Mail is carried under contract with the United States Government; express and passengers are carried for hire (R. 63, 89). Gasoline is used as fuel to propel the airplanes of respondent (R. 89).

The planes of the respondent land in Wyoming at the Cities of Cheyenne and Rock Springs (R. 101). The first stop to the east of Cheyenne is North Platte,

Nebraska, and the first stop to the west of Rock Springs is Salt Lake City, Utah (R. 101). The amount of intrastate commerce, as compared with the interstate commerce in Wyoming, is insignificant, and the interestate and the intrastate transportation of mail, passengers and express are so commingled that it would be impossible to apportion the tax between them (R. 94-95, 49).

The gasoline that is placed in the respondent's planes at Cheyenne and Rock Springs, Wyoming, is stored in the tanks of the respondent at the Cheyenne and Rock Springs airports and at the time it is taken from the tanks for use, a record is made of the amount used in interstate commerce and the amount used locally (R. 97-98). The tax is collected by the State Treasurer after the gasoline is used by the respondent (R. 97).

The taxes on gasoline which is used locally are paid without protest (R. 103). The taxes on gasoline used in respondent's planes as the fuel to propel the planes in interstate commerce are paid under protest, and these are the taxes which are the subject of this action (R. 93, 103). The protested taxes are paid in order to avoid the heavy penalties imposed by the Wyoming laws for non-payment (R. 90-91).

The taxes involved in this action were imposed by the State of Wyoming with respect to gasoline

placed in the planes of respondent in the State of Wyoming between March 15, 1930, and May 12, 1931, for use in interstate commerce (R. 55-56). The taxes paid under protest by respondent to the State of Wyoming during this period were in excess of $15,000.00 (R. 55-56).

The tax in question is imposed by ch. 115, Art. 11, Wyoming Revised Statutes for 1931, a copy of which is set forth in the appendix to petitioner's brief on file herein.

The gasoline with respect to which the tax in question was imposed was purchased by respondent both within and without the State of Wyoming (R. 97). On or before the 15th day of each month, the respondent paid to the State Treasurer the tax on all gasoline consumed by the respondent during the preceding calendar month (R. 99).

The District Court held that the tax in question, irrespective of whether the gasoline was acquired within or without the State of Wyoming, was a tax upon the *use* of gasoline. The Court recognized that, under the decision of this Court in *Helson v. Kentucky*, 279 U. S. 45, a tax imposed upon the use of gasoline in interstate commerce is an unlawful burden upon that commerce. The District Court held, however, that inasmuch as the proceeds of the tax were turned over by the State to the Cities of Chey-

enne and Rock Springs for the maintenance and improvement of their airports which were used by the respondent, the tax was in effect an exaction of compensation for the use of these airports and consequently was not an unlawful burden upon interstate commerce (R. 118-131).

The Circuit Court of Appeals held that the tax in question was a license tax on the wholesaler of gasoline which required the wholesaler to pay a tax upon the sale or use of all gasoline sold or used by him in Wyoming; that respondent was required to pay the tax with respect to gasoline purchased by respondent from a wholesaler in Wyoming but that the tax did not apply with respect to gasoline purchased by the respondent outside of the State of Wyoming (R. 134-144).

IV.

SUMMARY OF ARGUMENT.

I. Petitioners' contention that the Circuit Court of Appeals held the tax in question invalid as to gasoline purchased outside of the State is erroneous. The Circuit Court of Appeals took the view that the Wyoming Act merely imposed a license tax upon persons engaged in selling gasoline as wholesalers in the State and that therefore no tax could be collected under the statute in question as to gasoline purchased by respondent outside of Wyoming.

II. If petitioners are correct in their contention that the Circuit Court of Appeals held the Wyoming tax invalid with respect to gasoline purchased by respondent outside of Wyoming, the decision of the Circuit Court is in full accord with the decisions of this Court.

V.

ARGUMENT.

Point I.

Petitioners' Contention That the Circuit Court of Appeals Held the Wyoming Gasoline Tax Act Invalid With Respect to Gasoline Purchased Outside of the State Is Erroneous.

On the second page of petitioners' brief (p. 8 of petition and brief) the petitioners make the following statement:

> "The opinion of the United States Circuit Court of Appeals for the Tenth Circuit sustains the tax as legal on all such gasoline procured by respondent on purchases within the State of Wyoming and holds the tax to be illegal on all such gasoline procured by respondent on purchases outside the State of Wyoming and then brought into said state and used in propelling its airplanes in interstate commerce."

As we read the opinion of the Circuit Court of Appeals, that Court did not attempt to pass upon

the *validity* of the Wyoming Gasoline Tax Act as applied to gasoline purchased by respondent outside of the State. The Circuit Court simply held that the Wyoming Act did not apply with respect to such gasoline. Respondent does not agree with the Circuit Court in its conclusions as to the nature of the tax imposed. Respondent has consistently taken the position throughout this case that the tax imposed upon respondent with respect to gasoline purchased both within and without Wyoming is a tax upon the *use* of gasoline. The Circuit Court of Appeals, however, construes the Wyoming Act as imposing a license tax upon persons engaged in selling gasoline as wholesalers in Wyoming. As to gasoline purchased by the respondent from a wholesaler in Wyoming, the Court said that the wholesaler was obligated to pay the tax and that when respondent itself paid the tax it was simply discharging the primary obligation of the wholesaler. The Court sets forth its view in this connection in the following language:

> "The tax here under consideration is the license tax against the wholesaler exacted of him for the privilege of carrying on the business of selling gasoline, and when appellant made its purchase it had an option under the statute of then paying the tax added to the purchase price, or of assuming its payment and accounting to the State Treasurer therefor after it had used the gasoline. It chose to do the latter and thus

discharged a primary obligation of the wholesaler."

The view of the character of the tax imposed by the Wyoming Statute (thus expressed by the Circuit Court of Appeals) necessarily excluded from the operation of the statute the gasoline purchased by the respondent outside the State of Wyoming. The Circuit Court of Appeals has so held, and directed that an injunction issue against the collection of any tax with respect to the gasoline purchased by the respondent outside the State of Wyoming for use in fueling its planes in interstate commerce. The fact that the injunction is limited to gasoline used in interstate commerce does not militate against the view that the Circuit Court of Appeals held the tax inapplicable to gasoline purchased outside of the State rather than invalid as applied to gasoline used in interstate commerce. The limitation with respect to the injunction is apparently derived from the nature of the issues originally presented by the pleadings and the respondent's brief on appeal to the Circuit Court of Appeals.

If respondent is correct in its interpretation of the decision of the Circuit Court of Appeals it is clear that the usual reasons for granting a petition for a writ of *certiorari*, as outlined in Rule 38 of this Court, do not exist in this case. The decision of the Circuit Court of Appeals is not in conflict with the

decisions of other Circuit Courts or of the Courts of the State of Wyoming. The decision is not in conflict with the weight of authority and no important question of Federal law is involved in the decision. The decision rests solely upon the construction placed upon the Wyoming Gasoline Tax Act by the Circuit Court. It therefore appears that no sufficient reason exists for a review of the case by this Court.

Forsyth v. Hammond, 166 U. S. 506.

Point II.

If Petitioners Are Correct in Their Contention That the Circuit Court of Appeals Did Hold Invalid the Tax Imposed by the Wyoming Gasoline Tax Act on Gasoline Purchased by Respondent Outside of the State of Wyoming and Thereafter Imported Into Said State for Use in Its Airplanes in Interstate Commerce, Such Decisions Is in Full Accord With the Decisions of This Court.

The petitioners' position as to the nature of the tax is not clear, although petitioners recognize that it is an excise tax. (See page 8 of petition and brief.) The Wyoming Act is similar to many state gasoline tax statutes in that it imposes a tax upon the sale or use of gasoline. If the Wyoming Gasoline Tax Act applies to gasoline purchased by respondent outside of the State of Wyoming it must attach to the *use* of

that gasoline. Inasmuch as the gasoline was purchased by respondent outside the jurisdiction of the State, there is no act to which the tax may attach other than the *use* of the gasoline.

Petitioners contend that inasmuch as the gasoline purchased by respondent outside of Wyoming came to rest in Wyoming before it was consumed by respondent's planes, such gasoline was subject to the tax in question. Petitioners state that the tax is levied on gasoline which has acquired "a fixed *situs* within the State of Wyoming." This statement is not supported by the language of the statutes. The tax is not based upon the *situs* of the gasoline but upon its *sale* or *use*.

Respondent agrees that a State may validly impose a property tax upon property within its borders, even though that property is used in interstate commerce. The respondent does in fact pay property taxes to the State of Wyoming on gasoline held by it in that State for use in interstate commerce (R. 105). Furthermore, a State may impose excise taxes on purely intrastate transactions which are only remotely connected with interstate commerce. (See *Eastern Air Transport, Inc. v. South Carolina Tax Commission et al.*, 285 U. S. 147.) But in the instant case the particular act that is taxed is the *use* of gasoline—and that use is in interstate commerce.

The tax being imposed upon the *use* of gasoline, the fact that the gasoline came to rest within the State of Wyoming is unimportant. Irrespective of where the gasoline was situated at the time it was placed in the planes of respondent, the tax did not attach until that gasoline was actually used. Inasmuch as the use of that gasoline was in interstate commerce, the tax constituted an unlawful burden upon that commerce, under the decisions of this Court.

In the case of *Helson v. Kentucky*, 279 U. S. 245, decided by this Court in 1929, the plaintiffs in error operated a ferry boat on the Ohio River between Kentucky and Illinois, doing an exclusively interstate business. The gasoline which was used to operate the ferry boat was purchased in the State of Illinois, but about seventy-five per cent of it was consumed in the State of Kentucky. Under the Kentucky law a tax was imposed upon the sale or use of gasoline within the borders of the State. This Court, in holding that the imposition of this tax upon the use of gasoline within the State of Kentucky constituted an unlawful burden upon interstate commerce, said:

> "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car em-

ployed in such commerce. A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 'All restraints by exactions in the form of taxes upon such transportation or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the states.' *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 214, 29 L. Ed. 165, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826."

Petitioners, in their brief, have referred to the case of *Eastern Air Transport, Inc., v. South Carolina Tax Commission et al.*, 285 U. S. 147. In that case this Court sustained a tax on the sale of gasoline, although the gasoline was thereafter used in propelling airplanes in interstate commerce. It was held that the sale was purely a local transaction and the effect of the tax on such commerce was no greater or different than a general property tax upon the

same property would be. This Court recognized, however, that a general property tax or a tax upon purely local sales is manifestly different from a tax "laid directly upon the use of gasoline in interstate transportation." In the Eastern Air Transport case this Court recognized and approved the rule laid down in *Helson v. Kentucky* that a tax imposed upon the use of gasoline, when that use is in interstate commerce, constitutes an unlawful burden upon that commerce.

The petitioners also refer to the case of *Gregg Dyeing Co. v. Query*, 286 U. S. 472. In this case a tax was sustained upon the use of gasoline purchased outside of the State and imported for use in a cleaning business carried on solely within the State. However, this Court recognized that a tax imposed upon the use of gasoline, in interstate commerce is invalid, saying:

> "There is an exception in the case of a tax directly on use in interstate commerce as on use in interstate transportation. *Helson v. Kentucky*, 279 U. S. 245, 252; *Eastern Air Transport v. South Carolina Tax Commission*, decided March 14, 1932."

It cannot be questioned that under the decisions of this Court a tax imposed upon the use of gasoline in interstate commerce constitutes a violation of the commerce clause of the Federal constitution. If the petitioners are correct in their contention that the

Circuit Court of Appeals did hold the Wyoming Gasoline Tax unconstitutional with respect to gasoline purchased outside of the State, then it must be said that that Court was following the decisions of this Court. As we have heretofore stated, it is our opinion that the Circuit Court of Appeals does not rest its decision upon any constitutional ground. However, if the Circuit Court of Appeals did intend to pass upon the constitutionality of the Wyoming Gasoline Tax Act, as applied to gasoline purchased outside of the State, it was clearly correct in reaching the result that it did. If the Wyoming Gasoline Tax Act does apply to gasoline purchased outside of the State it must attach to the *use* of that gasoline and, under the decisions of this Court heretofore referred to, the tax imposed upon the *use* of gasoline in interstate commerce is clearly invalid.

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No. 571

Supreme Court of the United States

OCTOBER TERM, 1932.

WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners.

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

Respondent's Supplemental Brief

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No. 571

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WILLIAM H. EDELMAN, State Treasurer; HARRY R. WESTON, State Treasurer; THE CITY OF CHEYENNE, a municipal corporation; and THE CITY OF ROCK SPRINGS, a municipal corporation,

Petitioners,

v.

BOEING AIR TRANSPORT, INC., a corporation,

Respondent.

Respondent's Supplemental Brief

This brief is a supplement to the brief for the respondent in opposition to the petition for a writ of certiorari heretofore submitted to this Court. All references herein will be to the paging of the printed record in this Court and will be marked with the letter "R."

THE FACT SITUATION AND THE QUESTION INVOLVED.

Respondent, BOEING AIR TRANSPORT, INC., is engaged in transportation in interstate commerce by airplane (R. 89). It uses two municipally-owned airports in the State of Wyoming (R. 68-100). Gasoline is the fuel used for propelling the airplanes (R. 89, 102). Boeing Air Transport, Inc., purchases its gasoline both inside and outside the State of Wyoming and maintains storage facilities at the airports (R. 97). A small amount of local transportation business is carried on, but the gasoline used in the local business cannot be separated from that used in the interstate commerce business (R. 89, 94, 95, 102). A small amount of gasoline is sold by Boeing Air Transport, Inc., at the airports to other users (R. 90, 100). Some gasoline is used for testing and washing motors and for automobiles (R. 93). The balance of the gasoline is used for flights from the airports at Cheyenne and Rock Springs, in Wyoming, to points outside that State (R. 93, 103). The gasoline so used is the basis of the controversy before this Court (R. 5-6, 44, 93).

The question involved on this review of the judgment of the Circuit Court of Appeals for the Tenth Circuit is simply this: Can the respondent Boeing Air Transport, Inc., be required to pay to the State of Wyoming, under the present statute, a tax meas-

ured by the quantity of gasoline imported by it and used for flights from points in Wyoming to points in other States?

The Wyoming statute in question is set out in an appendix to the petition for a writ of certiorari, but, as so set out, does not include the titles of the various Acts and does not show the relation of the various amendments to the original Act. For this reason we are setting out in an appendix to this brief the Acts as passed by the Wyoming legislature.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND ITS INTERPRETATION OF THE WYOMING STATUTE.

Respondent contended in its brief in opposition to the petition for writ of certiorari that the Circuit Court of Appeals did not hold the Wyoming Gasoline Tax *invalid* with respect to gasoline purchased by respondent outside of Wyoming. It is respondent's opinion that the Circuit Court took the view that the Wyoming Gasoline Tax Act did not *apply* with respect to such gasoline. Petitioners in their supplemental brief have made no attempt to reply to this contention.

Respondent respectfully directs this Court's attention to Point I of the Argument in respondent's

brief in opposition to the petition wherein this contention is set forth. Hereinafter this brief will be in answer to petitioners' arguments which assume that the Circuit Court of Appeals did in fact hold the Wyoming Act *invalid* with respect to gasoline purchased by respondent outside of Wyoming.

SUMMARY OF ARGUMENT.

I. The recent decision of this Court in the case of *The Nashville-Chattanooga & St. Louis Ry. Co. v. Wallace,* No. 176, October Term, 1932, decided February 6, 1933, does not govern the case at bar.

II. The use which is the subject of the Wyoming Gasoline Tax is not storage or withdrawal from storage, but actual consumption in operation of respondent's planes in interstate commerce, and, under the decision of *Helson v. Kentucky,* 279 U. S. 245, a tax upon such use constitutes an unlawful burden upon that commerce.

III. The Act under which this tax is imposed is purely a revenue measure and its imposition upon the use of gasoline by the respondent's planes in interstate commerce is in no sense an exaction of compensation for the use of the Cheyenne and Rock Springs airports.

IV. If the tax imposed on gasoline taken into respondent's planes on the Cheyenne airport for use

in interstate commerce is construed as an exaction of compensation for the use of the Cheyenne airport, it is in violation of Section 10, Article I, of the Constitution of the United States because it impairs the obligation of that contract between the respondent and the City of Cheyenne dated July 1, 1929, and entered into prior to the effective date of the statute under which the tax is imposed.

ARGUMENT.

I.

The Recent Decision of This Court in the Case of The Nashville-Chattanooga & St. Louis Ry. Co. v. Wallace, No. 176, October Term, 1932, Decided February 6, 1933, Does Not Govern the Case at Bar.

In petitioner's supplemental brief great reliance is placed upon *The Nashville-Chattanooga & St. Louis Ry. Co. v. Roy C. Wallace, Comptroller, et al.*, No. 176, a decision of this Court announced February 6, 1933. In this case a tax imposed upon the storage and withdrawal from storage of gasoline was upheld, although the gasoline, after its withdrawal from storage, was used in interstate commerce. A sharp distinction was drawn between a tax imposed upon a transaction completed prior to the use of gasoline in interstate commerce, and a tax upon the use of the gasoline. It was held that since the storage and withdrawal from storage of gasoline was completed prior to its use in inter-

state commerce, the tax did not impose an unlawful burden upon that commerce. This Court said:

> "The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constituent elements. See *Bromley v. McCaughn*, 280 U. S. 124, 136-138. Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky, supra*. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. See *Eastern Air Transport v. Tax Commission*, 285 U. S. 147."

The doctrine of *Helson v. Kentucky*, 279 U. S. 245, that a tax upon the use of gasoline in interstate commerce is an unlawful burden upon that commerce was again approved by this Court, as follows:

> "We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation

of interstate commerce or gross receipts derived from it, are beyond the State taxing power, *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470; *Sprout v. South Bend*, 277 U. S. 163, 170, 171; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297, and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. *Helson v. Kentucky*, 279 U. S. 245."

Petitioners' argument, in their supplemental brief, resolves itself into this proposition: that inasmuch as the gasoline acquired by respondent outside of Wyoming and brought into that State for use could lawfully have been subjected to a tax under a statute similar to the Tennessee Act involved in the *Wallace* case, therefore the tax in the instant case is valid. The petitioners cite cases in support of the proposition that this Court will "regard the substance, rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State." We are quite in accord with the petitioners in their desire to have this Court regard the substance of this Act rather than the form. However, petitioners are in effect asking this Court to amend the statute and impose a tax upon the storage of gasoline instead of upon its use.

II.

The Use Which Is the Subject of the Wyoming Gasoline Tax Is Not Storage or Withdrawal From Storage, but Actual Consumption in Operation of Respondent's Planes in Interstate Commerce and, Under the Decision of Helson v. Kentucky, 279 U. S. 245, a Tax Upon Such Use Constitutes an Unlawful Burden Upon That Commerce.

The petitioners in their supplemental brief for the first time make the point that the subject of the tax in question is the storage and withdrawing from storage by the respondent of the gasoline used by it.

On page 4 of their supplemental brief the petitioners say:

> "Respondent stores and withdraws the gasoline on which petitioners collect the tax. Respondent uses the gasoline at the municipal air field; *that is, it stores and withdraws the gasoline at the air field.* Petitioners are not taxing the use of gasoline in generating motive power after it is withdrawn from respondent's storage tanks. If they were they would tax all gasoline so used from the time respondent's airplanes crossed the State line, as was attempted in the *Helson* case." (Italics are ours.)

It is apparent from this quotation that the petitioners base their present position upon the facts alone that the respondent stores at the airports the gasoline which it uses, and likewise withdraws the gasoline which operates its planes in interstate commerce from

that storage. The undisputed evidence as to the nature of the tax and the method of its collection shows clearly the unsoundness of petitioners' argument. On cross-examination, Mr. D. B. Colyer testified (R. 100), as follows:

> "Our method of making the payments is as directed by the State. For illustration, during the month of June we paid the taxes on gasoline used during May, and these were to be paid before the 15th of the month subsequent to that in which the gasoline was used. None of the tax is paid in advance of the use. It is all paid on the 15th of the month after it is used."

The fact that petitioners do not attempt to tax gasoline in the tanks of respondent's planes as they cross the Wyoming boundary lends no color to petitioners' contention. It would be highly impracticable, if not impossible, to impose a tax on such gasoline. The failure by the petitioners to do the impossible is hardly a proper aid to a construction of the statute in question.

The argument now advanced on behalf of petitioners does, however, serve the purpose of bringing sharply to the attention of the Court the crux of the controversy involved in this case with respect to the gasoline which is imported into the State of Wyoming by the respondent and used by the respondent exclusively in propelling its airplanes in interstate commerce. In order to sustain the tax imposed by the

Wyoming statute upon such gasoline, it is necessary for the petitioners to argue that the word "use" and the words "used for domestic consumption," as employed in the statute, mean, with respect to respondent, the storage of gasoline and its withdrawal from storage within the State.

The words "use" and "used for domestic consumption," as employed in paragraphs 2 and 3 of the Wyoming statute, are apparently so employed in their ordinary sense. The word "use" alone implies an application of the thing itself, or, as stated by Webster, "the act of employing anything or applying it to one's service; the state of being so employed or applied." This meaning of the word "use" was accepted and applied by this Court to a statute imposing a tax "upon the use of a foreign-built yacht" in the case of *Billings v. U. S.*, 232 U. S. 261. The word "consumption" qualifies the word "use" in paragraph 2 of the statute, wherein it is provided that there is levied "a license tax * * * on all gasoline used or sold in this State for domestic consumption." The statute clearly states that the use of gasoline which is subject to the tax is a use for domestic consumption. The retention of gasoline in storage for some future disposition, or the mere withdrawal from storage does not result in the "consumption" of the gasoline. It is well-known that the gasoline tax was designed to compel the owners of motor vehicles to contribute to the construction

and maintenance of highways. A motor vehicle uses gasoline by consuming it. It is absurd to contend that the Wyoming legislature intended to impose a tax upon the storage or withdrawal from storage of gasoline by a statute which taxes "gasoline used for domestic consumption."

The significance of the word "use," as employed in the Wyoming statute, is made plain by subdivision 2 of Section 1, defining gasoline. This section provides that "gasoline is hereby defined as a volatile substance produced from petroleum * * * and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles * * *." This language indubitably indicates that at the time this legislation was enacted the legislature was thinking in terms of the operation and propulsion of vehicles by the generation of motive power through the use of gasoline. When, therefore, in the succeeding paragraph of Section 2, the legislature imposed the tax on all gasoline *used for domestic consumption*, and in paragraph 3 provided for the payment of the tax by wholesalers upon all gasoline *used by them*, and upon every person who should *use* any gasoline in the State upon which the tax has not been paid by any wholesaler in the State, it meant by the word "use" such a use and such a use only as would necessarily result in the consumption or exhaustion of the gasoline.

Respondent is unfamiliar with any reported decision which supports petitioners' contention that the tax upon gasoline used, as imposed by the Wyoming statute, is not a tax upon the use of gasoline as used by respondent's planes. In the cases of *Bowman v. Continental Oil Co.,* 256 U. S. 642; *Hart Refineries v. Harmon,* 278 U. S. 499, and *Helson v. Kentucky,* 279 U. S. 245, it is clear that this Court viewed a tax upon the use of gasoline as a tax upon its consumption.

The petitioners attempt to distinguish the instant case from *Helson v. Kentucky, supra,* upon the ground that in the instant case the gasoline came to rest within the State of Wyoming before its use by respondent's planes in interstate commerce. The mere fact that the gasoline came to rest in the taxing state prior to its use in interstate commerce is unimportant. In *State Freight Tax Case,* 15 Wall. 232, a State tax imposed upon freight taken up within the State and carried out of it was held invalid. The fact that the property on which the tax was imposed originated within the taxing State did not validate the tax. Likewise, in the instant case, the tax is not based upon the situs of the gasoline but upon its use and that use is in interstate commerce.

It is true that in this Court's recent decision in *The Nashville C. & St. L. R. Co. v. Wallace,* No. 176, decided February 6, 1933, it is said that where gasoline has come to rest in storage the State is free to tax it

as it would any other property in the State, notwithstanding its prospective use as an instrument of interstate commerce. It is further said that the power to tax property, which means the taxation of the sum of all the rights and powers incident to ownership, necessarily includes also the power to tax its constituent elements. The Court, however, plainly says, in exactly the same connection, that these principles do not confer upon the State the right to tax property, or the elements of property, by a tax directly imposed upon the use of the property in interstate commerce.

The tax imposed by the Tennessee Act involved in the case of *The Nashville, etc., Ry. Co. v. Wallace, supra,* was expressly a privilege tax imposed upon persons and corporations "engaged in or carrying on the business * * * of selling or storing or distributing gasoline * * *." Insofar as the tax was imposed upon persons engaged in storing gasoline, it was measured by the amount withdrawn from storage, whether such withdrawal was for sale or other use. Hence, the tax was distinctly imposed upon a privilege connected with the ownership of property, which in and of itself could be completely exercised before any use was made of the gasoline in interstate commerce; as could also the privilege of selling gasoline which was the subject of the tax in *Eastern Air Transport v. South Carolina Tax Comm.,* 285 U. S. 147. But, as has been pointed out above, the Wyoming statute does not attempt t

impose the tax upon the storage of gasoline or its withdrawal from storage. Except for the tax on gasoline sold, it is only the use which is taxed, and this "use," as applied to the gasoline placed by the respondent in its airplanes at the airports in the State of Wyoming for propelling said airplanes in carrying on respondent's interstate commerce business, can mean only the use of such gasoline in interstate commerce. The case at bar is therefore within the principle of *Helson v. Kentucky,* 279 U. S. 245, and not within the principle of *Eastern Air Transport v. South Carolina Tax Commission,* 285 U. S. 147, or *The Nashville, etc. Ry. Co. v. Wallace,* decided February 6, 1933.

III.

THE ACT UNDER WHICH THIS TAX IS IMPOSED IS PURELY A REVENUE MEASURE AND ITS IMPOSITION UPON THE USE OF GASOLINE BY THE RESPONDENT'S PLANES IN INTERSTATE COMMERCE IS IN NO SENSE AN EXACTION OF COMPENSATION FOR THE USE OF THE CHEYENNE AND ROCK SPRINGS AIRPORTS.

In the supplemental brief of petitioners the following statement appears:

> "The District Judge sustained the tax as compensation to the cities for the facilities furnished and their outlay in maintenance and upkeep of the air fields. We do not deem it necessary to cite additional authorities to those relied on by him. He having found the compensation reason-

able, we think this finding will be accepted by this Court (R. 126-131)."

In their brief and argument before the Circuit Court of Appeals petitioners practically abandoned their contention that the tax in question was in effect an exaction of compensation for the use of the Cheyenne and Rock Springs Airports. The Circuit Court of Appeals did not rest its decision upon any such ground. In petitioners' petition for rehearing before the Circuit Court of Appeals no mention was made of this contention. In their brief filed in this Court in support of their petition for writ of certiorari the point was not suggested. However, in view of the fact that petitioners have raised the point in their supplemental brief, respondent feels compelled to point out briefly to this Court the reasons why there is no merit in the contention.

The District Court held that since the proceeds of the tax on gasoline collected at any municipal field were returned by the State to the municipality for the purpose of maintaining and improving the field, the tax was in effect an exaction of compensation for the use of the field. For the reasons hereinafter assigned, respondent submits that the tax was a true tax and in no sense an exaction of compensation for the use of the Cheyenne and Rock Springs airports.

A. The Power to Exact Compensation for the Use of Municipal Airports Is in the Municipality Owning the Airport and Is Not in the State of Wyoming.

By Section 5 of Chapter 72 of the Session Laws of 1927, the State of Wyoming authorized and empowered municipal corporations to acquire lands for airport purposes and to lease or let any such airport upon terms deemed satisfactory. Pursuant to this power conferred on municipalities, the cities of Cheyenne and Rock Springs acquired airports and thereafter entered into leases with respondent, whereby, in consideration of certain fixed rentals and other covenants to be performed by the respondent, the nonexclusive use of the landing fields was granted to the respondent (R. 69, 80). The cities of Cheyenne and Rock Springs having acquired airports pursuant to legislative act, it would seem clear that only those cities could fix the compensation to be paid for the use of the airports. It is also clear that the legislature, having granted power to the cities to lease their airports upon terms deemed satisfactory, did not intend, by the gasoline tax act, to prescribe the compensation to be paid for the use of the airports.

The power to exact compensation for the use of the Cheyenne and Rock Springs airports was in the cities owning those airports. The gasoline tax in question was exacted by the State of Wyoming. The cities,

having acquired the airports, alone had the power to determine the compensation to be paid for their use. The conclusion must follow that the State of Wyoming, in imposing the gasoline tax, was not seeking to exact compensation for the use of facilities entirely under the control of the cities of Cheyenne and Rock Springs.

B. There Is No Sufficient Relation Between the Gasoline Tax and the Use Made of the Airports to Justify Holding That the Tax Is a Charge Made Merely as Compensation for Such Use.

This Court has, on several occasions, rejected the contention that a certain tax was an exaction of compensation for the use of a facility when it appeared that there was no necessary relationship between the payment of the tax and the use of the facility.

The case of *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, is particularly applicable to the case at bar. In this case there was involved a tax levied by the State of Tennessee upon concerns operating interstate motor buses upon the highways of the State, graduated according to carrying capacity. It was held that the tax was invalid because there was not a sufficient relationship between the measure employed and the extent or manner of use of the State highways such as would justify a holding that the tax was a

charge made merely as compensation for the use of the highways by interstate buses. This Court said:

> "But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. *Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. Clark v. Poor,* 274 U. S. 554, *supra.* In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except insofar as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, *there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate buses.* We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory." (Italics are ours.)

As this Court clearly states in the foregoing case, in order to render valid a burden upon interstate commerce as a charge for the use of a facility, it must appear that the charge made is necessarily predicated upon the use of the facility.

Although it may be urged that the more respondent uses the fields of Cheyenne and Rock Springs, the more gasoline it will use, and, consequently, the greater its tax, nevertheless such a statement can be nothing more than a rough approximation. There is no necessary connection between the amount of the tax and the amount of use of the airport by the person paying the tax.

As an illustration, compare the use made of the Cheyenne airport by the respondent with that by a company that does not engage in interstate commerce, but simply makes local flights from the airport. On its eastbound trips the respondent lands at Cheyenne and places sufficient gasoline in its tanks to carry the planes to at least its next stop, which is North Platte, Nebraska, and on its westbound trips the plane lands at Cheyenne and sufficient gasoline is placed in its tanks to carry it to Rock Springs (R. 101). Obviously, the respondent's planes will not land at the Cheyenne airport as often as they would if respondent did a similar amount of flying in a local business with practically all of its landings upon the Cheyenne field. It appears from the evidence that there is a company using the Cheyenne field engaged in a purely local business (R. 100). Undoubtedly, this company pays much less in taxes in proportion to the amount that it uses the field than does respondent. Similar inequalities must necessarily result from the fact that the amount of the

tax is not at all dependent upon the amount of use that the taxpayer makes of the airport.

It is clear from the foregoing that a tax or charge which is not in some reasonable manner measured by the use of the facility cannot be regarded as compensation for such use. To this effect was the decision in the case of *Sprout v. South Bend*, 277 U. S. 163, wherein this Court held invalid a license fee imposed by the City of South Bend upon motor buses using the city streets, the Court saying:

> "A flat tax, substantial in amount and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the highways."

In the instant case the existence of leases between the Cities of Cheyenne and Rock Springs and the respondent, wherein the respondent is granted the right to use the municipal airports of those cities upon the payment by respondent of certain rentals, is further proof that there is no sufficient relation between the tax and the use made of the airports by the respondent to justify a holding that the tax is a charge for the use of the airports.

IV.

If the Tax Imposed on Gasoline Taken Into Respondent's Planes on the Cheyenne Airport for Use in Interstate Commerce Is Construed as an Exaction of Compensation for the Use of the Cheyenne Airport, It Is in Violation of Section 10, Article I, of the Constitution of the United States Because It Impairs the Obligation of That Contract Between the Respondent and the City of Cheyenne Dated July 1, 1929, and Entered Into Prior to the Effective Date of the Statute Under Which the Tax Is Imposed.

Certain provisions of the lease between the City of Cheyenne and the respondent, appearing in full on pages 80-89 of the Record, are hereinafter summarized:

(1) Term: 25 years, commencing July 1, 1929.

(2) The Company agrees to pay an annual rental of $4050 for a certain hangar and space for the erection of an additional hangar.

(3) Paragraph 14 provides:

> "The City agrees that the Boeing Company shall be entitled to the full use of said municipal field and landing field during the term hereof on terms as favorable as may be granted by the City to any other user thereof, and *that no charge shall be exacted from the Boeing Company for any use which it may make thereof additional to that herein specifically provided.*" (Italics are ours.)

(4) And paragraph 20 provides that the City will "impose no charge of any kind or character upon materials and/or products purchased or otherwise acquired by the Boeing Company for use on the premises herein leased."

It is important to bear in mind that the above lease was entered into approximately six months prior to the date upon which the Tax Act was amended to give municipalities the taxes upon gasoline collected at their airports. Prior to this amendment there was no possible basis for a contention that the tax was in the nature of an exaction of compensation for the use of airports. We therefore have a situation wherein the City of Cheyenne, after agreeing upon a fixed compensation for the use of its airport, claims that it is entitled to additional compensation by reason of legislation passed subsequent to the date of its agreement. It is at once clear that the imposition of this tax as compensation for the use of the airport would constitute a violation of Section 10 of Article I of the Constitution of the United States. The obligation of the City of Cheyenne to give the respondent the use of the airport under the terms provided in the lease would be substantially impaired if the City was allowed to exact compensation from the respondent in addition to that provided for in the lease.

Decisions of this Court make it clear that the exaction of compensation in addition to that provided

in the lease would constitute an impairment of the obligation of contract.

In the case of *Boise Artesian H. & C. Water Co. v. Boise City,* 230 U. S. 84, the City had granted a franchise authorizing the laying of water pipes in the streets of the city, without exacting any compensation therefor. The franchise was accepted and the grantees and their successors invested a large amount of money in the construction of a water system for the purpose of supplying inhabitants of the city with water. Subsequently, the City enacted an ordinance requiring the Water Company to pay a license fee of $300 a month for the privilege of laying and maintaining its water pipes in the streets. This Court held that the ordinance imposing the license fee impaired the obligation of the franchise contract under which the water pipes were maintained in the streets, and was therefore void.

In the above case there was no express provision in the ordinance prohibiting the imposition of additional charges. In the instant case the impairment of the obligation of contract is even more apparent than in the above case because the respondent and the City of Cheyenne expressly agreed that no additional charges for the use of the airport would be imposed. If the tax imposed on gasoline taken into respondent's planes on the Cheyenne airport for use in interstate commerce is construed as an exaction of compensation

for the use of that airport, the imposition of the tax unquestionably impairs the obligation of that contract between the respondent and the City of Cheyenne, dated July 1, 1929, and entered into prior to the effective date of the statute under which the tax is imposed.

Dartmouth College v. Woodward, 4 Wheat. 518;
Murray v. Charleston, 96 U. S. 432;
Coolidge v. Long, 282 U. S. 582;
Carondelet Canal Co. v. Louisiana, 233 U. S. 362.

CONCLUSION.

The Circuit Court of Appeals was of the opinion that the Wyoming tax did not apply to gasoline brought into Wyoming by respondent for use in respondent's planes in interstate commerce. If the view of the Circuit Court is adopted by this Court, the necessity of a decision upon the validity of the Wyoming statute, as applied to such gasoline, is avoided. If the tax does apply to such gasoline, it falls upon the use of the gasoline in interstate commerce. It is clear from the language of the statute and the facts in this case that it is the actual consumption of the gasoline upon which the tax is imposed. Under the decision of *Helson v. Kentucky, supra,* such a tax imposes an unlawful burden upon interstate commerce.

The contention raised by the petitioners, but not pressed, that the tax in question is an exaction of

compensation for the use of the municipal airports at Cheyenne and Rock Springs, is without merit. The power to exact compensation for the use of these airports is in the municipalities owning them and not in the State of Wyoming. Furthermore, under the decisions of this Court, there is not a sufficient relation between the tax and the use made of the airports to justify holding that the tax is a charge made merely as compensation for such use. In any event, if the tax is construed as an exaction of compensation for the use of the Cheyenne Airport it is in violation of Section 10 of Article I of the Constitution of the United States, because it impairs the obligation of the lease between the respondent and the City of Cheyenne entered into prior to the effective date of the statute under which the tax is imposed.

Respectfully submitted,

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APPENDIX

SESSION LAWS OF WYOMING, 1923.

CHAPTER 73

HOUSE BILL NO. 70.

GASOLINE TAX.

AN ACT providing a license tax on gasoline, providing for the collection thereof, defining certain words or phrases, prescribing manner and methods of payment, fixing penalties for failure to make same, and providing for the disposition of said taxes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

DEFINITIONS.

Section 1. The words and phrases used in this Act shall be construed for the purpose thereof, as follows: (1) "Wholesaler" is hereby defined as any person, firm or corporation who imports or causes to be imported gasoline, as herein defined, for sale in the State of Wyoming to the jobber or consumer, or to the persons, firms, corporations or associations of persons, who, in turn, sell to the jobber or consumer. The term "wholesaler" is further defined to mean any person, firm or corporation who produces, refines, manufacturers, blends or compounds gasoline in the State of Wyoming for use, sale or distribution in this State. (2) "Gasoline" is hereby defined as the volatile substance produced from petroleum, natural gas, oil shales or coal, heretofore sold under the name of gasoline, and such other volatile and inflammable liquids produced or compounded for the purpose of operating or propelling motor vehicles, except the product commonly known as kerosene.

AMOUNT OF TAX.

Section 2. A license tax of one cent per gallon is hereby levied on all gasoline sold in this State after March 1, 1923, for domestic consumption, to be collected as hereinafter set forth:

REPORT—PAYMENT OF TAX.

Section 3. On and after May 1st, 1923, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents, in this State, in the sale or use of gasoline as herein defined, shall not later than the fifteenth of each month render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of one cent per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm, or association, by the resident general agent or attorney, in the case of a foreign corporation, or by one of the principal officers in the case of domestic corporation.

RECORD BY WHOLESALER.

Section 4. Every wholesaler in gasoline as in this Act defined shall keep a record of all purchases, receipts, sales and distribution of gasoline; such records shall at all times be subject to inspection by the State Treasurer or his deputies or such other officers duly authorized by the State Treasurer.

FUNDS USED FOR MAINTENANCE OF HIGHWAYS.

Section 5. All funds received by the State Treasurer from the gasoline license tax provided in this Act, shall be

placed to the credit of the State Highway Fund for maintenance, and shall be apportioned between the several counties of the State in proportion to the number of miles of designated State Highways therein.

VIOLATION—PENALTY.

Section 6. It shall be unlawful for any such wholesaler, as herein defined, of gasoline, or other products subject to said tax, to sell or offer the same for sale in the State of Wyoming while delinquent in the payment of the whole or any part of the tax due and payable hereunder, and any such wholesaler who fails or refuses to pay the tax hereinbefore provided for at the time the same becomes due, shall be liable for double the amount thereof to be recovered in a suit instituted by and in the name of the State of Wyoming in any court of competent jurisdiction, in which suit, upon application made by the State of Wyoming, a writ of injunction may be issued against the defendant or defendants without requiring any bond, enjoining and restraining them from selling or attempting to sell or offer for sale in the State of Wyoming any gasoline or other products subject to said tax, while the whole or any part of the tax due from such defendant remains unpaid, and in such suit the court may, upon application made by the State of Wyoming, appoint a receiver of the property and business of the defendant, for the purpose of impounding the same as security for the payment of said delinquent tax and any judgment recovered in said suit. The State Treasurer or his assistant or deputies shall have the right, during business hours, to inspect the books and records of any party subject to said tax, for the purpose of determining the amount of the tax due and payable and whether the same has been paid. Any party violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction

thereof by any court of competent jurisdiction shall be subject to a fine of not less than five hundred dollars and not more than one thousand dollars, or to imprisonment for six months, or both such fine and imprisonment. The remedies herein provided shall be cumulative.

VALIDITY.

Section 7. The invalidity of any section, subdivision, paragraph, provision, sentence, or clause of this Act shall not in any manner effect the validity of the remaining portions thereof.

EXCEPTION.

Section 8. Said gasoline license tax shall not be imposed on gasoline when exported or sold for exportation from the State of Wyoming to any other State or Nation.

PROSECUTION.

Section 9. Upon request of the State Treasurer, it shall be the duty of the Attorney General to commence and prosecute to final determination in any court of competent jurisdiction, any and all necessary action or actions at law, to enforce the provisions of this Act.

Section 10. This Act shall take effect and be in force from and after the first day of April, 1923.

Approved February 26, 1923.

SESSION LAWS OF WYOMING, 1925.

CHAPTER 89.

ORIGINAL HOUSE BILL NO. 13.

GASOLINE TAX.

AN ACT to amend and re-enact Sections 2, 3, and 5, Chapter 73, Session Laws of Wyoming, 1923, providing a license tax on gasoline and providing for the disposition of such license taxes, and display of price signs by dealers in gasoline and prescribing penalty for violation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 2, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

AMOUNT OF TAX.

"Section 2. A license tax of two and one-half cents per gallon is hereby levied on all gasoline used or sold in this State after March 1, 1925, for domestic consumption, to be collected as hereinafter set forth."

Section 2. Section 3, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

COLLECTION AND STATEMENT OF AMOUNT COLLECTED.

"Section 3. On and after March 1, 1925, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month,

render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of two and one-half cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm, or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation."

Section 3. Section 5, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

APPORTIONMENT OF FUNDS DERIVED.

"Section 5. All funds received by the State Treasurer from the gasoline license tax provided in this Act, shall be placed to the credit of the State Highway Fund for maintenance, and shall be apportioned between the several counties of the State in proportion to the number of miles of designated State Highways therein."

DISPLAY OF SIGN.

Section 4. Each retail dealer in gasoline may prominently display in a conspicuous place near the gasoline filling pump a sign at least twelve inches square containing a legible and plainly printed statement in the English language showing the amount of State license tax and the total retail price per gallon of gasoline.

Section 5. This Act shall take effect and be in force from and after April 1, 1925.

Approved February 25, 1925.

CHAPTER 70.

ORIGINAL HOUSE BILL NO. 68.

GASOLINE SALES TAX.

AN ACT to amend and re-enact Section 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Sections 1 and 2, Chapter 89, Session Laws of Wyoming, 1925, and to amend and re-enact Section 4 of Chapter 89, Session Laws of Wyoming, 1925, relating to display of price signs by dealers and providing a penalty for violation thereof; providing a license tax on gasoline and for the collection and statement of the amount of tax collected.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 2, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 1, Chapter 89, Session Laws of Wyoming, 1925, is hereby amended and re-enacted to read as follows:

GASOLINE TAX.

"Section 2. A license tax of three cents per gallon is hereby levied on all gasoline used or sold in this State after March 1, 1927, for domestic consumption to be collected as hereinafter set forth."

Section 2. Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 89, Session Laws of Wyoming, 1925, is hereby amended and re-enacted to read as follows:

PAYMENT OF TAX.

"Section 3. On and after March 1, 1927, each and every wholesaler as defined in this Act, who is now engaged or

who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of three cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation. Every person who shall use any gasoline in this State upon which the said tax has not been paid by any wholesaler in this State, shall, on or before the 25th day of each calendar month, beginning with the second calendar month after this Act has become effective, render a true statement to the State Treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of three cents per gallon on all gasoline as shown by such statement to have been used by him."

Section 3. Section 4, Chapter 89, Session Laws of Wyoming, 1925, is amended and re-enacted to read as follows:

DISPLAY OF SIGN.

"Section 4. Every person, firm or corporation, who shall have in his possession, for the purpose of sale or who shall sell or offer for sale to the retail trade, gasoline for use in motor vehicles, shall display in a conspicuous place a sign stating the price at which said gasoline shall be sold and the amount of tax thereon. And any person, firm or

corporation who shall neglect to so give the notice provided for in this Act, or who shall violate any of the provisions of this Act, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than twenty-five ($25.00) dollars, nor more than one hundred ($100.00) dollars or by imprisonment in a County Jail for not less than ten days nor more than thirty days, or by both such fine and imprisonment."

Approved February 26, 1927.

SESSION LAWS OF WYOMING, 1929.

CHAPTER 139.

ORIGINAL HOUSE BILL NO. 159.

GASOLINE TAX.

AN ACT to amend and re-enact Sections 2 and 3, Chapter 73, Session Laws of Wyoming, 1923, as amended by Sections 1 and 2, Chapter 70, Session Laws of Wyoming, 1927, and to amend and re-enact Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 3, Chapter 39, Session Laws of Wyoming, 1925, and to amend and re-enact Section 6, Chapter 73, Session Laws of Wyoming, 1923; providing for a license tax on gasoline, and for the collection and statement of the amount of tax collected; providing for the disposition of said taxes, and fixing penalties for violation of any of the provisions of this Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 2, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 1, Chapter 70, Session Laws of Wyoming, 1927, is hereby amended and re-enacted to read as follows:

AMOUNT OF TAX.

"Section 2. A license tax of four cents per gallon is hereby levied on all gasoline used or sold in this State after April 1, 1929, for domestic consumption to be collected as hereinafter set forth."

Section 2. Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of Wyoming, 1927, is hereby amended and re-enacted to read as follows:

PAYMENT OF TAX.

"Section 3. On and after April 1, 1929, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State in the sale or use of gasoline as herein defined, shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same time, the license tax of four cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an indiviual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation."

Section 3. Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 3, Chapter 89, Session Laws of Wyoming, 1925, is hereby amended and re-enacted to read as follows:

DISTRIBUTION OF MONEY RECEIVED FROM TAX.

"Section 5. Seventy-five per centum of all funds received by the State Treasurer from the gasoline license tax provided for in this Act, shall be placed to the credit of the State Highway Fund for maintenance, improvement and asphalt oil surfacing for State Highways and shall be apportioned between the several counties of the State in proportion to the number of miles of designated State Highways therein. The remaining twenty-five per centum shall be apportioned by the State Treasurer between the several counties of the State, thirty per centum in the ratio which

the area of the county bears to the total area of the State, excepting areas included in National Parks; thirty per centum in the ratio which the rural population of the county bears to the total rural population of the State according to the last available State or Federal census, and forty per centum in the ratio which the assessed valuation of the county bears to the latest total assessed valuation of the State, and on July 15th, and quarterly thereafter, he shall pay same to the respective county treasurers who shall credit the same to the county road fund; Provided that seventy-five per centum of all refunds or other expense paid by the State Treasurer according to law, shall be charged to the State Highway Fund, and twenty-five per centum to the fund to be apportioned among the counties."

Section 4. Section 6, Chapter 73, Session Laws of Wyoming, 1923, is hereby amended and re-enacted to read as follows:

VIOLATION—PENALTY.

"Section 6. It shall be unlawful for any such wholesaler, as herein defined, of gasoline, or other products subject to said tax, to sell or offer the same for sale in the State of Wyoming while delinquent in the payment of the whole or any part of the tax due and payable hereunder, and any such wholesaler who fails or refuses to pay the tax hereinbefore provided for at the time the same becomes due, shall be liable for double the amount thereof to be recovered in a suit instituted by and in the name of the State of Wyoming in any court of competent jurisdiction, in which suit, upon application made by the State of Wyoming, a writ of injunction may be issued against the defendant or defendants without requiring any bond, enjoining and restraining them from selling or attempting to sell or offer for sale in the

State of Wyoming any gasoline or other products subject to said tax, while the whole or any part of the tax due from such defendant remains unpaid, and in such suit the court may, upon application made by the State of Wyoming, appoint a receiver of the property and business of the defendant, for the purpose of impounding the same as security for the payment of said delinquent tax and any judgment recovered in said suit. The State Treasurer or his assistant or deputies shall have the right, during business hours, to inspect the books and records of any party subject to said tax, for the purpose of determining the amount of the tax due and payable and whether the same has been paid. Any party violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars and not more than two hundred dollars, or to imprisonment for one month, or to both such fine and imprisonment. The remedies herein provided shall be cumulative."

Section 5. This Act shall take effect and be in force from and after April 1, 1929.

Approved February 25, 1929.

CHAPTER 14.

HOUSE BILL NO. 6.

PAYMENT OF GASOLINE TAX.

AN ACT to amend and re-enact Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of Wyoming, 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, providing for a license tax on gasoline and for the collection thereof and providing for statements of gasoline sold or used by wholesalers or users and the payment of the tax by them; and providing for the disposition of the tax from gasoline used on municipal air fields and fixing penalties for violation of any of the provisions of this Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WYOMING:

Section 1. Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended and re-enacted by Section 2, Chapter 70, Session Laws of 1927, as amended and re-enacted by Section 2, Chapter 139, Session Laws of Wyoming, 1929, is hereby amended and re-enacted to read as follows:

"Section 3. On and after April 1, 1929, each and every wholesaler as defined in this Act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of his representatives or agents in this State, in the sale or use of gasoline as herein defined, shall not later than the fifteenth of each month, render to the State Treasurer a statement of all gasoline sold or used by them in the State of Wyoming during the preceding calendar month, and pay to the State Treasurer at the same

time, the license tax of four cents per gallon on all such gasoline. Said statement to the State Treasurer shall be upon blanks furnished by him, and shall be sworn to by the owner or managing agent in the case of an individual, firm or association, by the resident general agent or attorney, in the case of a foreign corporation or by one of the principal officers in the case of a domestic corporation. Every person, firm or corporation, who shall use any gasoline in this State, upon which the said tax has not been paid by any wholesaler in this State, shall, on or before the 15th day of each calendar month, beginning with the first calendar month after this Act has become effective, render a true statement to the State Treasurer, duly signed and sworn to, and accompany such statement with the payment of a tax of four cents per gallon on all gasoline as shown by such statement to have been used by him; provided that before making the distribution of funds provided for in Section 1 hereof, the State Treasurer shall pay over all funds received from the gasoline license tax on gasoline used at any municipal air field to the city or town where such air field is located, to be used for the maintenance and improvement of such air field."

Section 2. Any party violating any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be subject to a fine of not less than fifty dollars and not more than two hundred dollars, or to imprisonment for one month, or to both such fine and imprisonment.

Section 3. All Acts or parts of Acts in conflict with this Act are hereby repealed.

Section 4. This Act shall take effect and be in force from and after its passage.

Approved December 23, 1929.

Section 3, Chapter 73, Session Laws of Wyoming, 1923, as amended by Section 1, Chapter 14, Session Laws of Wyoming, 1929, Special Session, and Section 5, Chapter 73, Session Laws of Wyoming, 1923, as amended by Section 3, Chapter 139, Session Laws of Wyoming, 1929, were amended by the Wyoming legislature in 1931. The 1931 Session Laws are not included because they were enacted subsequent to the institution of this suit. In the Appendix to the petition for writ of certiorari the Wyoming Gasoline Tax Law, as amended by the 1931 Session Laws, is set forth.

CORRECTED COPY

pp. 1-2

SUPREME COURT OF THE UNITED STATES.

No. 571.—October Term, 1932.

William H. Edelman, State Treasurer; Harry R. Weston, State Treasurer; The City of Cheyenne, et al., Petitioners,
vs.
Boeing Air Transport, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 17, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a ~~Delaware~~ Washington corporation operating airplanes in Wyoming, brought this suit in equity in the District Court of Wyoming against petitioners, state tax officials, and the cities of Cheyenne and Rock Springs, to enjoin the collection of a state excise tax levied upon the use of gasoline by respondent within the State, as a violation of the commerce clause of the Constitution. As respondent waived relief by interlocutory injunction, see *Smith* v. *Wilson*, 273 U. S. 388, 391, the case was tried before a single judge who upheld the tax and dismissed the case on the merits. 51 F. (2d) 130. On appeal the Court of Appeals for the Tenth Circuit reversed the decree and directed that the petitioners be enjoined from assessing the tax on gasoline procured by respondent by "purchases completed outside the State of Wyoming and then brought into that State and used in its planes in interstate commerce". 61 F. (2d) 319. This Court granted certiorari. — U. S. —.

The statute[1] levies a "license tax of four cents per gallon . . . on all gasoline used or sold in this State . . . for domestic consumption" and requires every "wholesaler" engaged in the "sale or use of gasoline" within the State to report to the State treasurer each month all the gasoline "sold or used" by it in the State, and to pay the tax upon it. Gasoline "exported or sold for exportation

[1]Wyoming Laws of 1929, c. 14, amending Laws of 1929, c. 139; Laws of 1927, c. 70; Laws of 1925, c. 89; Laws of 1923, c. 73.

from the State" is exempted from the tax. A "wholesaler" is defined as any person (1) who "imports or causes to be imported gasoline . . . for sale in the State . . . to the jobber or consumer, or to the persons . . . who, in turn, sell to the jobber or consumer", or (2) who "produces, refines, manufactures, blends or compounds gasoline" in Wyoming "for use, sale or distribution in this State". In addition the statute provides that "every person . . . who shall use any gasoline in this State upon which the said tax has not been paid by any wholesaler in this State," shall render a like statement and pay a like tax.

Respondent maintains an airplane service for the transportation in interstate commerce of passengers, mail and express with airports at Cheyenne and Rock Springs. It purchases gasoline both within and without the State, which it intermingles and stores in tanks at the two airports. It pays the tax without objection ~~on the gasoline which it purchases within the State, and on which the tax has not been paid by the wholesaler, as well as~~ on all gasoline which it sells within the State at its airports or withdraws from the tanks for local use. But it contends, and the court below held, that the tax cannot validly be applied to the gasoline imported from outside the State, stored in tanks at the airports and used for "filling" the interstate airplanes in which it is eventually consumed.

The opinion below leaves us uncertain whether the injunction was granted upon the ground that the taxing statute does not, in any event, apply to gasoline purchased without the state, if not sold within it, or upon the ground that the taxation of gasoline purchased outside the state and used at respondent's airports to "fill" its interstate planes, though authorized by the statute, is a prohibited burden on interstate commerce. But the bill of complaint sought no relief on the ground that the statute does not apply to the gasoline so used and no question of the applicability of the tax is argued here. Issue is joined on the only question raised by the pleadings, whether the taxation of the gasoline which respondent withdraws from storage and uses for "filling" its planes imposes an unconstitutional burden on interstate commerce. Hence we confine our decision to that question.

As the statute has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is ap-

plied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. Compare No. 176, *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace,* decided February 6, 1933; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472; *Hart Refineries* v. *Harmon,* 278 U. S. 499; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642.

A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in No. 176, *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra.* There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson* v. *Kentucky",* 279 U. S. 245. As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Despite the fact that the statute as applied is identical in operation with that sustained in No. 176, *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace, supra,* respondent contends that as the statute is written, the tax is one on the consumption of gasoline in propelling its airplanes in interstate commerce, invalid under *Helson* v. *Kentucky, supra.* In that case a Kentucky statute taxing the use of gasoline was applied to that purchased and placed in the tanks of a ferry boat outside the State for use in operating it in interstate commerce. The tax, which was levied only with respect to the gasoline consumed while the ferry boat was within the State, was held to be invalid as, in effect, a direct tax on the privilege of carrying on interstate commerce.

But the officers of Wyoming, charged with the enforcement of the taxing statute, are giving no such application to it as was given to that in *Helson* v. *Kentucky, supra,* and it is not suggested that they will. All that has been done or threatened by them, under their interpretation of the statute, infringes no constitutional right of the complainant. In the circumstances, no case is presented, either by pleadings or proof, calling on a federal court of equity to rule upon the correctness of some other construction which may never be adopted by the state administrative officials or by the state courts.

Reversed.

Mr. Justice VAN DEVANTER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.